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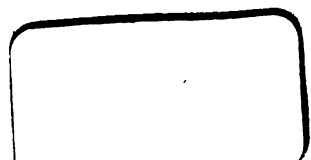
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1860.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

Vol. XII.

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PREFACE.

The unexpected and irreparable loss occasioned by the death of Mr. JOHN PROFFATT, has compelled the publishers of the *AMERICAN DECISIONS* to select another editor to continue the work begun by him, and by him developed into a remarkable success. Their choice fell upon me, and I have undertaken the editorial supervision of this great work.

The assistants of Mr. Proffatt have been retained, both because of their competency, and their familiarity with his plans and his methods of work. Every effort will be made to keep the selections of the *DECISIONS*, their annotations and all other parts of the work up to the standard heretofore attained. I must, however, beg the public to remember, that at first I shall labor under certain disadvantages. I cannot at once become so conversant with the work already done as was he by whom it was planned and executed; nor can I, at once, expect to exhibit that skill which comes only from long familiarity with this kind of employment. The public may, however, rely on my, at all times, putting forth my best efforts to make the *AMERICAN DECISIONS* worthy of continued confidence and support.

A. O. FREEMAN.

Sept. 26, 1879.

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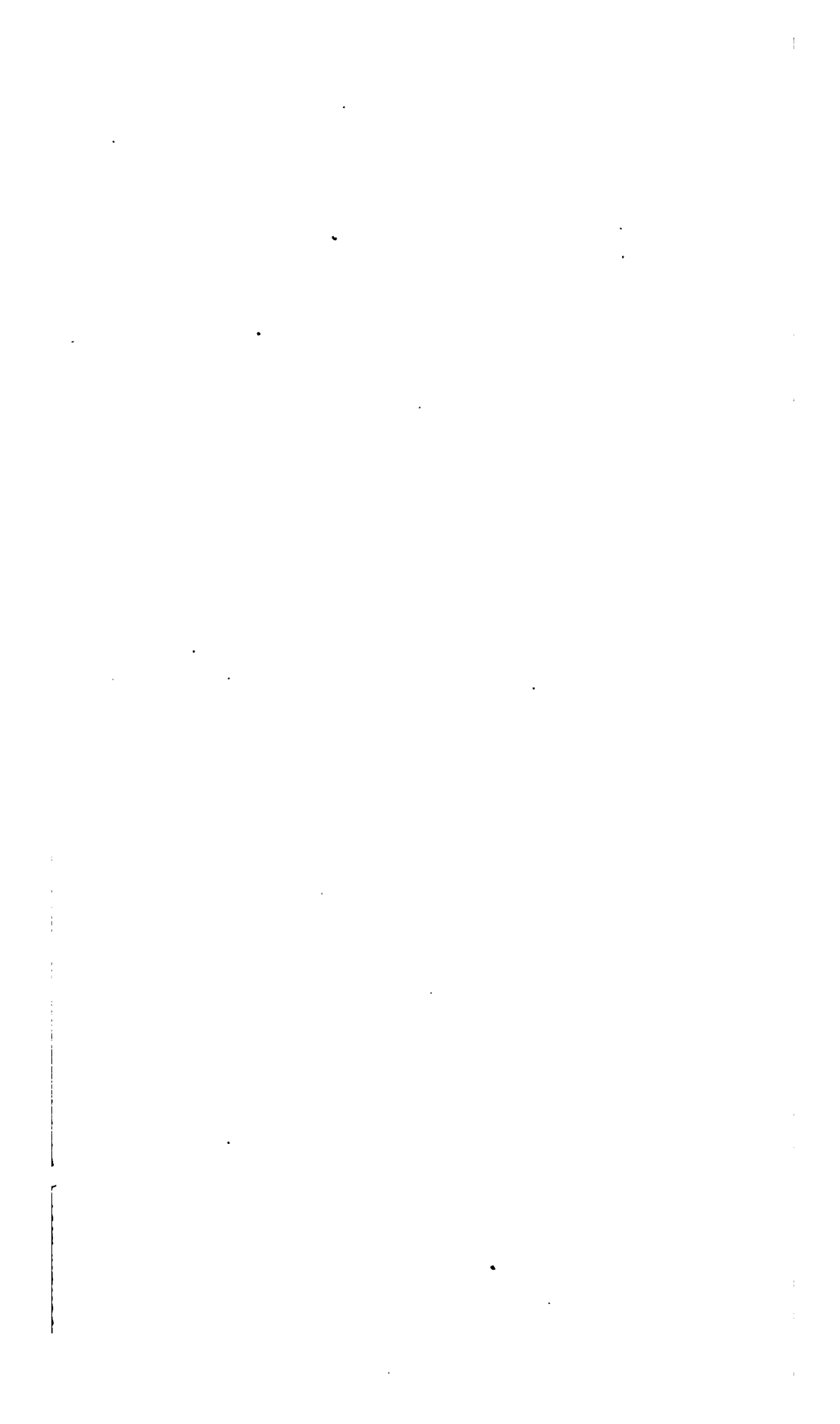
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AMERICAN DECISIONS.
VOL. XII.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

STATE *v.* DUNN.

[Minor, 46.]

MANDAMUS WILL NOT LIE, on behalf of one claiming the office of judge of a county court, directing another who holds the commission and is in the exercise of its duties to admit the petitioner to that office.

THE LEGISLATURE, AFTER MAKING AN ELECTION, have power while assembled to revise or alter what they have done.

PETITION for a mandamus. The opinion states the case.

By Court, **WEBB, J.*** The applicant sets forth by his petition, that on the — day of November last, an election was held for the office of judge of the county court of Blount; that on counting the votes it appeared that he had thirty-three, and said Dunn thirty-two votes. Whereupon the speaker of the house of representatives announced that said Mead was duly elected. Some members, who had been absent during the election, then came in, and asked leave to vote, which the speaker decided they had then no right to do. A motion was then made and carried to go into the election for said office again, and on counting the votes taken on the second election, it appeared that Dunn had a majority of the whole number of votes given, and he was thereupon announced to be duly

* During the period comprised by the decisions reported in *Minor*, until the election in 1835, under the constitution, the supreme court consisted of Abner S. Lipscomb, appointed chief justice, upon the resignation of Clement C. Clay in 1823, Reuben Saffold, Henry Y. Webb, Richard Ellis and Anderson Crenshaw. Henry Minor was appointed in 1835 to fill the vacancy occasioned by the death of Judge Webb, and John Gayle was elected to the seat rendered vacant by the elevation of Judge Lipscomb. After the election in 1835 the court was composed of Lipscomb, C. J., Saffold, Gayle, John White, John M. Taylor, and Crenshaw, associate justices.

elected; that said Mead applied to the governor for a commission, which he refused to grant, and on the same day issued a commission to Dunn. The statements in the petition are supported by copies of the journals of the senate and house of representatives, and certificates from the secretary of state.

For the petitioner it is contended that an injury has been done, that the proper remedy is by mandamus, and that the power to issue this writ in such a case properly belongs to this court. The writ of mandamus is said to be a high prerogative writ, issuing from a superior tribunal to any person, corporation, or inferior court of judicature, requiring them to do that justice which in duty and by virtue of their office they are bound to do. It lies in relation to an office which is attempted to be held and exercised by virtue of an appointment which is merely colorable and void. It is said not to be the proper remedy when the election is doubtful. If an officer be actually sworn in, his right should be first tried: 3 Burr, 1454; 4 Id. 2010. In the present case it would at least seem reasonable that the person invested with the office should have an opportunity to defend his right before he is disturbed in its exercise. Would it be proper on an *ex parte* application, which admits that the supreme executive power, acting within the authority delegated by the constitution, has issued a commission to declare that commission merely colorable and void? Or is it only voidable on sufficient evidence as to the nature of the election, and as to the right of the petitioner? The latter conclusion seems most compatible with the powers and duties prescribed by the constitution to the co-ordinate departments of this government.

But that there is another mode by which the right of the incumbent, Dunn, can be tried, will not be questioned; and it is in general a sufficient reason to refuse a mandamus, that the party applying for it has another specific legal remedy: 1 Term, 404; 3 Id. 652; 4 Bac. Ab. 506. The authorities seem to settle this principle beyond controversy. The case of *The King v. The Mayor of Colchester*, 2 Term, 259, not noticed in the argument, was an application to admit Grimwood to the office of recorder of Colchester, on the ground that the mayor had refused legal votes given for the applicant, and improperly admitted others given for the candidate, who was admitted and sworn into office. The court were clearly of opinion that it was a decisive answer to the application for a mandamus, that there was another remedy by information in the nature of

quo warranto, by which the title of the office in possession could be tried as well as on a mandamus. The reason for refusing a mandamus, as stated by the reporter, was, there was a recorder *de facto*, and the applicant had another remedy by *quo warranto*. The analogy between that case and the present is certainly strong.

The petitioner prays that the mandamus may be directed to the judge of the county court of Blount county. Does the duty of admitting one to the office of judge of the county court appertain to that office? The county court is of limited power and jurisdiction. No such power seems to have been prescribed to it by the statute, or by any law, to appertain to it. In the many cases which have been introduced, and a number of others which have been examined by the court, and in the precedents which have been looked into, not a case has been found in which the writ was directed solely to the person intended to be ousted; but all warrant the conclusion that it must issue to those having the power to appoint or admit, not to one who, by the petition itself, is supposed to have no official power whatever. Applications of this nature have heretofore required the writ to command some person or persons in public trust to discharge some duty, which they are competent and are bound to perform. Here the writ is required to be directed to one to whom the law has given no power to perform the duty to be required.

From the matter shown by the petitioner, we are of opinion that there is *de facto* a judge of the county court of Blount; that the petitioner has another special legal remedy; that the petition prays that the writ may be directed to one who has no power to execute its mandate, and that the petition be denied.

An order having been obtained to show cause why an information in the nature of a *quo warranto* should not be filed.

By Court, WESS, J. Without deciding whether an information in the nature of a *quo warranto* can in any case originate in this court we proceed to inquire if any legal purpose can be attained by it in the present case. Was Dunn's election legal or not? It is the opinion of the court that it was perfectly competent for the two houses of the legislature, while they were assembled together for the purpose of making the election, to revise or alter what they had done while thus assembled. In the present case they did so revise and alter their first proceeding, and by their last act on this subject declared that Dunn was elected. Let the rule be discharged.

MANDAMUS TO RESTORE OFFICER UNLAWFULLY REMOVED.—It is a clear and settled principle of law that one who holds the commission, certificate, or other legal evidence of title to an office shall be permitted to have quiet possession of it and of all the rights incidental to it, and to discharge its duties and enjoy its emoluments until he is legally ousted. And as the exigencies of the public business require that all offices should be constantly and properly served it is necessary that there should be some expeditious and summary method of putting every office into the possession of the person who is *prima facie* entitled to it, without waiting for the determination of the ultimate right to such office. The remedy by mandamus is such a method, and has been used for this purpose from the earliest times: Moses on Mandamus, 150; High on Extraordinary Legal Remedies, sec. 67; 3 Bl. Com. 110; *Street v. County Commissioners*, Breese, 25; *Dru v. Judges*, 3 Am. Dec. 639; *Ex parte Diggs*, 52 Ala. 381; *Ex parte Wiley*, 54 Id. 226; *Singleton v. Commissioners*, 2 Bay, 106; *People v. Board of Police*, 35 Barb. 535; *Banton v. Wilson*, 4 Tex. 400; *Lindsey v. Luckett*, 20 Id. 516; *Felts v. Mayor of Memphis*, 2 Head, 650; *Harwood v. Marshall*, 9 Md. 83; *Strong's case*, 20 Pick. 484; *Curtis v. McCullough*, 3 Nev. 202; *People v. Hallett*, 1 Col. 352; *State v. Watertown*, 9 Wis. 254. Originally the issuance of this writ was a branch of the prerogative of the king as the sovereign controller of all the subordinate officers of the kingdom, and being lodged in the king's bench as the representative of his majesty, was denominated one of the "flowers" of that court: High on Ex. Leg. Rem., sec. 3. But in the United States it is regarded as merely an extraordinary legal remedy appertaining to superior courts of law for the direction and control of inferior courts and officers: *Kendall v. United States*, 12 Pet. 615; *Kendall v. Stokes*, 3 How. 100; *Commonwealth of Kentucky v. Dennison*, 24 Id. 66; *Dove v. School District*, 41 Iowa, 69; *Brown v. Crego*, 29 Id. 321. It is an indispensable prerequisite to the issuance of the writ in a case of unlawful exclusion from office, as well as in all other cases, that there should be a clear legal right and no other adequate or specific remedy: High on Ex. Leg. Rem., sec. 10; *Napier v. Poe*, 12 Ga. 170; *Trustees v. State*, 11 Ind. 205; *People v. Thompson*, 25 Barb. 73; *People v. Booth*, 49 Id. 31; *People v. Dowling*, 55 Id. 197; *People v. Hawkins*, 46 N. Y. 9; *Fitch v. McDiarmid*, 26 Ark. 482; *Ex parte Hays*, Id. 510; *State v. McAuliffe*, 48 Mo. 112; *State v. Stockwell*, 7 Kan. 98; *State v. Bridgman*, 8 Id. 458; *Manafield v. Fuller*, 50 Mo. 338; *Winters v. Burford*, 6 Cold. 328; *People v. Chicago*, 53 Ill. 424; *Hardcastle v. Maryland etc. R. R. Co.*, 32 Md. 32; *People v. State Ins. Co.*, 19 Mich. 392; *People v. State Treasurer*, 24 Id. 468; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *State v. Heron*, 29 La. Ann. 848; *People v. Supervisors of Presque Isle*, 36 Mich. 377; *State v. Garechak*, 3 Mo. App. 526; *Tyler v. Taylor*, 29 Gratt. 765; *State v. Mayor of Newark*, 35 N. J. L. 396; *People v. Hoyt*, 66 N. Y. 606.

NOT PROPER REMEDY TO TRY TITLE TO OFFICE.—Mandamus is essentially an executive and not a creative remedy. It simply commands and enforces the performance of ascertained duties of a public, or quasi public, nature, which already exist, and does not attempt to impose any new duties. It does not undertake to give a party any rights which he did not possess before, nor to adjudicate doubtful rights which he may claim. It proceeds in every case upon the assumption that the applicant has an immediate and complete legal right to the thing demanded. Indeed, its utility depends upon this fact; for if it could be used to try or determine doubtful rights, the inevitable "law's delay" would deprive it of its peculiar value as an expeditious remedy. It results, therefore, from its very

nature, that it cannot be employed for the purpose of settling conflicting claims to an office. It is no part of its functions to determine contested elections. Hence one who applies for it for the purpose of being admitted or restored to an office must show a legal *prima facie* title, complete in everything but possession, particularly where the office is occupied by another claiming title. If he show less than this the writ will be denied, for the court will not undertake in this proceeding to try his title. This is the settled doctrine of a great majority of the cases: *High on Ex. Leg. Rem.*, sec. 49; *Moses on Mandamus*, 49; *People v. Olds*, 3 Cal. 167; *Meredith v. Supervisors of Sacramento*, 50 Cal. 433; *Warner v. Myers*, 4 Ore. 72; *People v. New York*, 3 Johns. Cas. 79; *People v. Stevens*, 5 Hill, 616; *Matter of Gardner*, 68 N. Y. 467; *Dewey v. Hobart*, 10 Nev. 28; *Anderson v. Coleson*, 1 Neb. 172; *State v. Hyams*, 12 La. Ann. 719; *State v. Legarde*, 21 Id. 18; *State v. Johnson*, 29 Id. 399; *Ex parte Daughtry*, 6 Ired. 155; *Brown v. Turner*, 70 N. C. 93; *Fitch v. McDiarmid*, 26 Ark. 482; *Underwood v. White*, 27 Id. 382; *People v. Treasurer of Ingham*, 36 Mich. 416; *State v. Auditor*, 34 Mo. 375; *State v. State Auditor*, 36 Id. 10; *Barnes v. Gottschalk*, 3 Mo. App. 111, 222; *People v. Forquer*, Breese, 68; *People v. Detroit*, 18 Mich. 338; *People v. Head*, 25 Ill. 325. In case of a contest there must be a judgment of ouster against the incumbent before the writ will issue in favor of the contestant: *Commonwealth v. Commissioners*, 2 Para. Sel. Cas. 220. The proper legal method of trying a contested right to an office is *quo warranto*: *People v. Stevens*, 5 Hill, 616; *Ex parte Daughtry*, 6 Ired. 155; *Fitch v. McDiarmid*, 26 Ark. 482. Mandamus has, however, been held in a number of decisions to be an appropriate remedy in such a case: *Banton v. Wilson*, 4 Tex. 400; *Lindsey v. Luckett*, 20 Id. 516; *Harwood v. Marshall*, 9 Md. 83; *Strong's case*, 20 Pick. 484; *Conlin v. Aldrich*, 98 Mass. 557; *Dew v. Judges*, 3 Am. Dec. 639.

CASES WHERE THE OFFICE IS ALREADY FILLED by one claiming title are, as just indicated, those which occasion the most difficulty. Mr. Moses lays down the rule to be that the writ will not issue in such cases: *Moses on Mandamus*, 150. Mr. High draws a distinction between those cases where the application is for admission to an office which the applicant has never occupied, and those where he applies to be restored to an office from which he claims to have been unlawfully ousted. In the former class of cases this discriminating writer lays down the rule to be that the writ should not be allowed, while in the latter class of cases he states the correct doctrine to be that the fact that another has been installed in the office is no obstacle to the issuance of the mandamus: *High on Ex. Leg. Rem.* sec. 49, 67. The cases, however, in which the writ has been allowed, where the office was at the time occupied by another, do not seem to go upon any such distinction. Indeed, if the distinction exists it is probably accidental. The remedy is more readily allowed where the applicant has previously occupied the office merely because the proof of his right to the office is ordinarily more clear in such a case. In several of the cases, however, in which the writ has been issued the applicant had not formerly held the office, and it was at the time filled by another claiming title. Thus in *Harwood v. Marshall*, 9 Md. 83, the contest was in regard to the office of state librarian. The incumbent claimed that his term had not legally expired, while the applicant who had been subsequently elected insisted that the term had expired. The court granted the writ, although the applicant had not previously been installed in the office. In *Warner v. Myers*, 4 Ore. 72, the office in dispute was that of sheriff. The incumbent, who was the old sheriff, having been a candidate

for re-election claimed to have received a majority of the legal votes, although the canvassers declared the result to be in favor of his competitor, and awarded the certificate to him. The incumbent refusing, therefore, to deliver up the office, the court granted a mandamus to put the holder of the certificate in possession of the insignia of office, leaving the old sheriff to his remedy by action. *Kimball v. Lamprey*, 19 N. H. 215, and *People v. Head*, 25 Ill. 322, were cases of a somewhat similar nature. The true ground upon which the cases seem to rest is this: If the applicant can show a clear *prima facie* legal title to the office, and if the contest involves merely the determination of a simple question of law, as in *Harwood v. Marshall*, 9 Md. 83, and *Dew v. Judges*, 3 Am. Dec. 639, the writ will be awarded whether the office is filled at the time or not, and without reference to the question as to whether the applicant has previously occupied it. But the court will not enter upon any investigation of questions of fact, and will not undertake to adjudicate and enforce a doubtful right. It will not go behind the certificate, commission, or other declaration of title to the office issued or made by the proper authority to inquire into the ultimate right. The appropriate function of the writ is, as already stated, to put the office into the possession of the person having the legal evidence of title to it; and, in general, the court will not permit a mere usurper to turn the holder of the legal title into the position of a contestant. But the rule forbidding the trial of a contested right to an office which is already filled, in a proceeding of this nature, is so stringent that a mandamus will be denied for such a purpose even where the attorney-general refuses to bring *quo warranto*, and the party is thus left practically without remedy: *Matter of Gardner*, 68 N. Y. 467. And mandamus will not lie to compel the attorney-general to bring *quo warranto*, for that is a matter resting in his official discretion: *People v. Fairchild*, 67 N. Y. 334.

MANDAMUS AGAINST THE INCUMBENT to admit or restore one unlawfully excluded from an office does not lie it should seem, both on principle and authority, except in certain cases, but must be directed to the authority having power to admit or restore. It is a settled principle of the law of mandamus, that it does not lie in relation to mere private rights, or against mere private persons: High on Ex. Leg. Rem., sec. 25; *American Asylum v. Phoenix Bank*, 10 Am. Dec. 112; *State v. Brilyman*, 8 Kan. 458; *State v. Trent*, 58 M. 571; *Hussey v. Hamilton*, 5 Kan. 462; *State v. Powers*, 14 Ga. 388. In its origin and use it is essentially a writ for the control of inferior officers and jurisdictions in relation to their official duties. Since it must appear, in order that the writ may issue at all to restore one to an office, that the incumbent is a mere intruder and trespasser, without any right to occupy the office or to perform its duties, it would be absurd to call upon him to surrender the office as an official duty. He can have no official duty in the premises, because he is not an officer. The proper course is, therefore, as stated in the principal case, to issue the writ to the authority having power to admit or restore, commanding that the applicant be put in possession of the office. Where, however, the office is in possession of the former lawful incumbent, who refuses to surrender it to his successor, the writ should issue to such incumbent; for it is one of the duties of every officer to give up the office and its insignia to his lawfully chosen and qualified successor: *Walter v. Belding*, 24 Vt. 658; *Burr v. Norton*, 25 Conn. 103; *Warner v. Myers*, 4 Ore. 72; *People v. Head*, 25 Ill. 322. The duty to surrender the office is in such case an official duty. It must be admitted, however, that it has been held proper in some cases to issue the writ to the incumbent

even where it was claimed that he was a mere usurper: *Banton v. Wilson*, 4 Tex. 400; *Lindsey v. Luckett*, 20 Id. 216; *People v. Kilduff*, 15 Ill. 492; *Kimball v. Lamprey*, 19 N. H. 215.

WHERE THE OFFICE WILL EXPIRE before relief can be had under the writ it will not be issued. Thus a mandamus was refused where it was applied for to restore an ejected officer, it appearing that the lawful term was only one year, and that it would terminate before the applicant could be put in possession: *Howard v. Gage*, 6 Mass. 462; *Woodbury v. Commissioners*, 40 Me. 304.

MANDAMUS LIES TO A CORPORATION to compel a restoration of franchises of a public nature. Thus, the writ will be issued to restore a member of a corporation ejected without due notice: *Delacy v. Neuse River Nav. Co.*, 9 Am. Dec. 636; *Commonwealth v. German Soc.*, 15 Pa. St. 251; *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 86; but not to restore an expelled member of a church congregation, although the church is incorporated, where membership in the congregation is distinct from membership in the corporation: *People v. German etc. Church*, 63 N. Y. 103. It lies also to reinstate a minister unlawfully excluded from his pulpit where temporal rights are involved: *Runkel v. Winemiller*, 1 Am. Dec. 411; *People v. Steele*, 2 Barb. 397. So also to compel an officer of a religious society to deliver up the books and papers to his successor: *St. Luke's Church v. Slack*, 7 Cush. 226.

A TRESPASS UPON OFFICIAL RIGHTS will not be restrained by mandamus, for this is not a preventive remedy. Herein lies one of the points of difference between mandamus and injunction. The former writ commands the performance of positive duties; the latter prohibits the commission of wrongs. Hence, the writ of mandamus will not be issued upon the application of an incumbent of an office to prevent others from disturbing him in his office: *Board of Police Commissioners v. Mayor of Annapolis*, 42 Md. 203. It was held, however, in *People v. Scrugham*, 20 Barb. 302, that the writ would issue in favor of the incumbent against one attempting to intrude into the office, but the reasoning upon which the decision is based is not very satisfactory.

ANONYMOUS.

[MINOR, 52.]

INJURY TO THE PLAINTIFF'S REPUTATION may be averred and proved by him in an action of trespass *vi et armis*, for unlawfully entering his house under the pretense of searching for stolen goods.

TRESPASS *vi et armis*. The opinion states the case.

By Court, CRENSHAW, J. The declaration alleges that the defendant, with force and arms, broke and entered into plaintiff's dwelling-house, under pretense of searching for money stolen, and unlawfully, unreasonably, and maliciously searched said house without a warrant, etc., by means whereof plaintiff and his family were disturbed in their dwelling, his private papers exposed to the eye of curiosity, and he greatly injured

in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace, etc. The defendant demurred, and assigned for causes: 1. The plaintiff claims consequential damages for an injury to his character in an action of trespass *vi et armis*; 2. An injury with force cannot be joined in the same action with an injury to the character. The court below sustained the demurrer, which is the matter assigned as error here.

It is laid down by the most approved authorities, that in this action damages are recoverable for all injuries which naturally result from the wrongful act which constitutes the trespass. In many instances it is not necessary to allege such incidental or consequential injuries in the declaration; but they may be given in evidence, under the general allegation of *alia enorma*. The declaration here alleges that by reason of a tortious entry into the plaintiff's dwelling-house, and an unlawful and malicious search for stolen money, he sustained an injury in his character. Can we conceive any act better adapted to wound sensibility and destroy reputation? It is the natural and immediate consequence of the unlawful and malicious entry and search of the plaintiff's dwelling. He may have sustained no pecuniary loss; but the injury fixes on him the eye of public suspicion, inflicts a rankling wound on his feelings, and tends to prostrate his character. We think that in this form of action damages may be recovered for such a consequential injury. It is immaterial whether it be averred in the declaration or not; it may be given in evidence, and if it naturally results from the original trespass, goes to aggravate the damages, though it is not to be viewed as a substantive cause of action in the case. I know of no action which would lie for this consequential injury to the plaintiff's character. If he cannot obtain satisfaction in this form of action, he is without remedy.

Let the judgment be reversed, and the cause be remanded for further proceedings.

JUDSON v. ESLAVA.

[Minor, 71.]

IRREGULAR JUDGMENT.—Money received upon an execution issued under a judgment irregularly entered may be recovered in an action of *assumpsit*. **EVIDENCE OF THE CONTENTS** of an instrument will not be admitted where it is averred that the writing could not be found and was last seen in the possession of one H. T., but where no evidence that H. T. was dead

or beyond seas, or that efforts to obtain his testimony had been made, was offered.

AFTER ARGUMENT ON ERRORS assigned, a *certiorari* will be awarded in order to sustain the judgment, where there appears to be diminution.

Assumpsit. The opinion states the case.

Crawford and Hitchcock, for the plaintiff.

Salle, contra.

By Court, LINSCOMB, C. J. This was an action of *assumpsit* instituted in the superior court of Mobile county by Eslava against Judson. The declaration contains but one count for money had and received; the defendant there relied on the general issue.

On the trial bills of exceptions were taken by Judson, to the decisions of the court, on his motions for instructions to the jury, rejecting evidence offered by him, and to the charge of the court to the jury.

It appears that before the institution of this action, Judson brought suit against Eslava in the superior court of Mobile county, a verdict was rendered in his favor, and judgment entered thereon. At a subsequent day of the term, Eslava entered a motion for a new trial, which was not disposed of during the term. Before the next term execution issued, the sheriff collected the money and paid it over to Judson. At the next term the motion for a new trial was heard, the judgment set aside, and a new trial granted.

The counsel for the plaintiff in error contends that this was a judgment with which the court below could not rightfully interfere, after the term at which it had been rendered. That money received under a judgment is not recoverable in any form of action until that judgment shall have been reversed; and that if money had been extorted, or payment wrongfully compelled, *assumpsit* is not the proper form of action for the injury.

It is clear that money received under a judgment is not recoverable so long as the judgment remains unreversed. But was there a legal judgment in full force when this money was collected of Eslava and paid to Judson? By a rule of court, then governing the practice of the superior courts of the territory, a motion for a new trial, etc., was expressly declared to have the effect of superseding the operation of a judgment, until the motion or rule should be discharged. It is insisted,

however, that this rule of court should have been produced and made part of the record in the court below. A court is bound to know its own rules. The rule was adopted by competent authority, and was obligatory on the parties. Then after the motion for a new trial was entered, and until after it had been disposed of, there was no judgment in the cause, and the execution was unauthorized. As to the form of action: The action of assumpsit lies to recover money which the defendant is in equity and good conscience bound to pay to the plaintiff. Even if the defendant has by a tort obtained possession of the plaintiff's money, he may waive the tort and recover in assumpsit. It follows that the evidence was applicable to the issue, and that the court below did right in admitting it, and in the instructions to the jury: 1 Tidd. 16.

Another point relied on for the plaintiff in error is that parol evidence offered by him of the contents of a note was improperly rejected. In laying the ground for this evidence, the testimony of Mr. Acre shows, that as attorney for Judson he had filed this note with the papers in another case; that he had since searched for and could not find it; and that when he last saw it, it was in the possession of the Hon. Harry Toulmin. There was no proof that Toulmin was dead or beyond the jurisdiction of the court, or that any effort had been made to obtain his testimony, the best as to the fact of loss. It does not appear but that Judge Toulmin then had the note, or could on inquiry have directed where it might be found. With no better proof of the loss, to have admitted evidence of its contents would have been a departure from a rule of evidence sanctioned by the most enlightened jurists from time immemorial—a rule obviously necessary to guard against the concealment or perversion of the truth, by withholding the best, and introducing evidence of a secondary character.

Another assignment is, that the verdict is insufficient, being for damages and interest from a given day, but not ascertaining any day to which it shall be calculated. As to this matter the record appears to be imperfect. It does not show the day on which the verdict was rendered, or the day when the term began. In this there appears to be diminution. The counsel for the defendant may avail himself of this suggestion, if he thinks proper.

The defendant's counsel accordingly obtained an order for a certiorari.

THE REVERSAL OF A JUDGMENT, by an appellate court, or an order setting it aside, made by the court which rendered it, entitles the party against whom it was obtained to recover from his adversary, as far as practicable, all things lost thereby. Hence money collected under it may be recovered back, not because there was any wrong in the collection of it, but because the authority under which it was collected having ceased to exist, the party is bound, *ex aequo et bono*, to return it to the rightful owner: Freeman on Judgments, sec. 482; *Raun v. Reynolds*, 18 Cal. 275; *Clark v. Pinney*, 6 Cow. 297; *Simpson v. Hornbeck*, 3 Lans. 53; *South Fork Canal Co. v. Gordon*, 2 Abb. U. S. 479; *McAusland v. Pundt*, 1 Neb. 211. In the principal case, however, the original collection was unwarranted, because made in direct violation of a rule of court.

SECONDARY EVIDENCE OF THE CONTENTS OF A WRITING is admissible only when it has been shown: 1. That the writing once existed; 2. That after due and reasonable diligence the party cannot produce it in court. If the writing is traced to the possession of one not a party, he must be served with a *subpoena duces tecum*, or shown to be beyond the reach of the process of the court: 1 Greenl. Ev. sec. 558; Whart. on Ev. sec. 150; *Ralph v. Brown*, 3 Watts & S. 395; *Rusk v. Sowerwine*, 3 Harr. & J. 97.

MORGAN v. SCOTT.

[Minor, 81.]

FRAUD UPON THE PARTNERSHIP by one of two partners will be relieved against in a court of equity. So, where a partner gave notes in the name of the firm and afterwards confessed judgment thereon, equity will relieve the copartner from such judgment, it appearing that he had no knowledge of the proceedings until the judgment had been obtained. A FINAL HEARING ON THE DEMURRER of one of two defendants may be had, although the other defendant had not appeared, provided sufficient has been disclosed to enable the court to determine the rights of all the parties concerned.

BILL for an injunction against a judgment at law. The bill was dismissed. Morgan sued out a writ of error. Scott and Click were parties defendant in this cause, and the decree complained of was pronounced upon the demurrer of Scott and prior to the appearance of Click. The opinion states the facts.

McCiury and H. G. Perry, for the plaintiff.

Owen, contra.

By Court, CRENSHAW, J. It appears from the bill that Click and Morgan were copartners in trade. Click, without the consent or knowledge of Morgan, and contrary to the articles of copartnership, fraudulently executed an instrument of writing under seal, in the name of the firm, for the payment of a sum of money to Scott, on what consideration complainant knows not. Click, with a view of charging Morgan with this debt,

permitted Scott to obtain a judgment at law. Morgan, in fact, had no notice of the proceedings or opportunity to defend until after the judgment had been obtained. That Click most fraudulently and iniquitously combined with Scott to charge Morgan, and prevented Scott from entering certain credits on the execution. Though not expressly charged, it is strongly intimated, that Scott was in combination with Click through the whole transaction, and that Click is insolvent. Scott demurred to the bill, and the circuit court sustained the demurrer, dissolved the injunction, and dismissed the bill with costs.

It is a well-settled principle that one partner cannot charge the firm by his writing under seal, unless he is authorized to do so by the articles of copartnership, or by the express consent of his copartners. But equity cannot relieve against a judgment at law on such instrument against the firm, if obtained without surprise, fraud, or connivance; because the copartners, who had not consented to the instrument, might have made full and effectual defense at law. But against an improper judgment surreptitiously or collusively obtained, it is the peculiar province of a court of equity to afford relief; for without the aid of equity the complainant would be remediless, having had no opportunity to defend at law. The demurrer admits the truth of all the charges and allegations in the bill, therefore I cannot hesitate in concluding that this instrument of writing was intended as a fraud on the complainant, and that the judgment was obtained without his having any knowledge of the pendency of the suit, or any opportunity of making a defense. The complainant had also the right to apply to a court of equity for a discovery of the amount of the credits which ought to have been entered on the execution, and to compel the plaintiff at law to enter satisfaction *pro tanto*. The demurrer, therefore, ought not to have been sustained.

As to the second assignment, I conceive that it was at the option of the complainant to bring the cause to a final hearing, on the coming in of the plea or answer of one defendant, provided that sufficient matter was disclosed or submitted to enable the chancellor to determine on the rights of all the parties concerned, otherwise the plea should stand until the coming in of the answers of the others.

The decree of the court must be reversed, and the cause be remanded for further proceedings. In this opinion the court are unanimous.

PARTNER'S POWER TO AFFIX SEAL.—It is well settled that one partner has no power, without express authority, to bind his copartners by an instrument under seal: *Gerard v. Basse*, 1 Am. Dec. 226; *Williams v. Hodgson*, 3 Id. 563; *Skinner v. Dayton*, 10 Id. 286; *Parsons on Partnership*, 178 and note.

POWER TO CONFESS JUDGMENT.—"The same principles of the common law which operate to disable a partner from binding his copartners by special'y, must, it should seem, still more completely incapacitate him to bind them without their distinct assent, by a voluntary confession of judgment:" *Parsons on Part.*, 180, note; *Freeman on Judgments*, sec. 545. Therefore, a voluntary confession of judgment by one partner, without the assent of his copartner is void as to the latter, though it will bind the former: *Gerard v. Basse*, 1 Am. Dec. 226; *Williams v. Hodgson*, 3 Id. 563; *Green v. Beals*, 2 Cai. 254; *Crane v. French*, 1 Wend. 311; *Bitzer v. Shunk*, 1 Watts & S. 340; *Morgan v. Richardson*, 16 Mo. 409; *Motteux v. St. Aubin*, 2 W. Bl. 1133. But the non-assenting partner will be held to acquiesce in the judgment if he do not express his dissent by applying for relief: *Green v. Beals*, 2 Cai. 254; *Crane v. French*, 1 Wend. 311; *St. John v. Holmes*, 20 Id. 609. And such application must not be made by him jointly with the partner, who confessed the judgment, or it will be disregarded: *St. John v. Holmes*, 20 Wend. 609. And although the judgment so confessed is not binding on the persons or separate property of the dissenting partners, it may be satisfied out of the partnership property: *Grier v. Hood*, 25 Pa. St. 430; *Ross v. Howell*, 84 Id. 129.

THE FRAUD AND COLLUSION apparent in the principal case, make it much stronger than those where the deed is made, or the judgment confessed, merely without the assent of the copartner. Fraud is a familiar ground of equitable relief against judgments, as well as against other contracts: *Freeman on Judgments*, sec. 489 *et seq.* It is an indispensable element of the validity of every judicial proceeding, that it be free from fraud and collusion: *Lee v. Lee*, 55 Ala. 602.

COBURN v. HARWOOD.

[MINOR, 23.]

WORDS CHARGING THE CRIME AGAINST NATURE are not actionable *per se* in Alabama.

THE OFFICE OF THE INNUEUDO IS MERELY EXPLANATORY; it cannot enlarge or change the import of the words used, or give a criminal meaning to innocent words.

SLANDER. Harwood brought an action against Coburn for having spoken words charging him with the crime against nature. Special damages were not averred. The plaintiff recovered judgment, from which a writ of error was taken.

Crawford and Hitchcock, for the plaintiff.

H. W. Taylor, contra.

By Court, **SARFOLD, J.** It is a settled principle of the common law, that words which, if true, would subject the accused to infamous punishment, or to an indictment for a crime involv-

ing moral turpitude, are in themselves actionable, without averment or proof of special damages: 5 Johns. 190 [*Brooker v. Coffin*, 4 Am. Dec. 337.]

The rule of construction as to slanderous words has, in the history of jurisprudence, undergone several changes. At one time a rigid construction prevailed; at other times, the words were to be understood in *mitiori sensu*; but the rule, as now settled, is to construe the words in that sense which is most natural and obvious—in the plain and popular sense in which the rest of the world understands them: 6 Bac. 233, etc.

For the plaintiff in error it is contended that the words do not import the charge laid in the innuendo, and that the innuendo cannot supply their meaning. The innuendo is merely explanatory of something already expressed. It cannot render certain words which would otherwise be uncertain, give a criminal meaning to innocent words, or add to, extend, or change the sense of the words previously stated: 1 Tidd. 384-6; Bac. Ab. 250. But it may give a technical meaning to a slanderous charge, from the obvious import of the words spoken, taken in connection with the colloquium.

Thus, in the case cited in 6 Bac. 254, in a colloquium concerning the death of D. D., the defendant said to plaintiff: "You are a bad man, and I am thoroughly convinced that you are guilty;" meaning of the murder of said D. D. In the case before us, the technical description of the offense charged, and the identity of the parties, are properly to be inferred from the innuendo. Do the words stated in the declaration, in the natural, plain, and obvious sense in which the world understands them, import a charge of the crime as stated in the innuendo? Where the defendant said of a widow, "I have had the use of her body," it shall not be intended that those words meant the use of her body as a physician, or that she had done bodily labor for him; but the words shall be construed in their usual sense, which is very slanderous: Cro. Ja. 162. In the present case, no one who heard the words could doubt their import. Would the charge, if true, subject the plaintiff to infamous punishment, or to an indictment for a crime involving moral turpitude? Though unquestionably a crime of the highest moral turpitude, "the very mention of which is a disgrace to human nature; a crime not fit to be named amongst Christians," the statutes of this state have taken no notice of it. Is it an indictable offense by the common law?

It does not appear that it was punishable in England other-

wise than by death, excepting that in the time of Popery it was subject to ecclesiastical censure. By the ancient Britons it was sometimes punishable by burning. In the time of Richard I. the practice was to punish by hanging: 6 Bac. 327. The statute of Henry VIII., after reciting that there was not a sufficient punishment appointed, declares it felony without benefit of clergy. It is said in the English books, that previous to the passage of this statute, the practice of punishing this offense with death had been for some time discontinued; and this is strongly corroborated by the enactment of the statute and its recital prefixed. It does not appear what other punishment, or that any, was inflicted, from the time of discontinuing capital punishment, and till the enactment of the statute of Henry VIII. This crime, then, is not indictable by the common law, or by any statute of this state: See Turner's Dig. 247, sec. 4; Laws Ala. 522, sec. 4. The words spoken are not in themselves actionable; and there is no averment of special damages. The omission is not cured by the verdict; for the plaintiff's title, as stated, is defective.

The judgment must therefore be reversed.

WORDS ACTIONABLE *PER SE*.—It has given courts and text-writers much difficulty to lay down a general, and at the same time accurate rule, by which to determine what words orally published are actionable *per se*. This difficulty and the consequent diversity of adjudication have grown out of the fact that the actionable character of words depends very much upon the state of public morals in the place where, and at the time when they are uttered. The distinction between words actionable in themselves and those actionable only upon allegation and proof of special damage, as is well stated in Townshend on Slander and Libel, secs. 56 and 150, is based merely upon a rule of evidence. Words of both classes are actionable upon the same grounds and for the same reasons. The noxious quality in both lies in the fact that they are the natural and proximate causes of pecuniary damage to those concerning whom they are maliciously uttered. The only difference between them is in the matter of proof of the resulting injury. In the case of words actionable *per se* their injurious character is a fact of common notoriety, established by the general consent of men, and the court consequently takes judicial notice of it. They necessarily import damage, and therefore such damage does not require to be pleaded or proved. Words not actionable *per se*, are those whose injurious effect must be established by due allegation and proof. In determining upon the actionable nature of words, therefore, courts are very likely, unless controlled by precedent, to decide in accordance with the general and fixed opinion of the particular locality as to the damaging effect of the charge contained in the words. Hence, the decisions are apt to vary with the moral and social condition and views of different communities.

A pertinent illustration of this local coloring of judicial opinion in questions of slander is found in certain decisions made in some of the southern

states in the days of African slavery. It was held in a number of cases in South Carolina that words charging a white person with being a mulatto, or with having negro blood in him were actionable *per se*: *Eden v. Legare*, 1 Bay, 171; *Wood v. King*, 1 Nott & McC. 184; *Atkinson v. Hartley*, 1 McC. 203. Rutledge, C. J., in delivering the opinion of the court in *Eden v. Legare*, 1 Bay, 171, mentioned several cases where it had been formerly held that an action lay for such words; "because, if true, the party would be deprived of all civil rights, and moreover would be liable to be tried in all cases under the negro act, without the privilege of a trial by jury." He held, therefore, that words "which tended to subject a citizen to such disabilities were actionable." In *Wood v. King*, 1 Nott & McC. 184, Nott, J., said that words charging one with having negro blood were clearly actionable "within the rules and principles of the common law;" for, if the words were true, they would tend to reduce a party "to the state and condition in which that degraded class of people is placed." Such language would hardly be used by a South Carolina judge of the present day. And notwithstanding what was said by Mr. Justice Nott, it is certain that such a charge, however scandalous it may have been deemed in that state, does not fall within any of the accepted definitions of actionable words, or within any of the classifications of such words at common law. It is notable also that in *Barret v. Jarvis*, reported in the note to *Goodenow v. Tappan*, 1 Ohio, 83, it was held not to be actionable *per se* to charge one with being akin to negroes. A similar illustration of the influence of public sentiment in the particular locality, upon the decision of questions of this kind, is furnished in Massachusetts, where it is held that a charge of drunkenness against a woman is actionable *per se*, although the offense may be punishable only by a small fine, on the ground that punishment of a woman for an act of that kind "must bring disgrace upon her:" *Brown v. Nickerson*, 5 Gray, 1. There are communities where a charge of drunkenness even against a woman would not be regarded as essentially disgraceful.

CLASSIFICATION OF ACTIONABLE SLANDERS.—Owing to this varying influence of local public opinion, in such cases it has been found practically impossible to frame such a definition of words actionable *per se* as will be general enough to include all imputations which have been held thus actionable and yet specific enough to separate such charges from those which are only actionable upon proof of special damage. The most that can be done is to classify the charges which have been adjudged actionable *per se* when published orally; for it is not intended here to speak of libels, or actionable charges embodied in writing or printing, or in effigy. Mr. Townshend thus classifies oral words which are deemed actionable *per se*: 1. Those which charge an indictable offense, involving moral turpitude; 2. Those which charge the being afflicted with certain diseases; 3. Those which affect one in his office, profession, occupation, or business, or in some special character: Townshend on Slander and Libel, secs. 153a, 179-196. Mr. Justice Clifford in *Pollard v. Lyon*, 91 Otto, 225, gives a somewhat more elaborate classification. After alluding to the difficulty of fixing upon any accurate test in such cases, he says: "Different definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander as a cause of action may be divided into five classes, as follows: 1. Words falsely spoken of a person which impute to the party some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished; 2. Words falsely spoken of a person, which impute that the party is infected with some contagious disease, where if the charge

as true, it would exclude the party from society; or, 3. Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment; 4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade; 5. Defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage." An examination of the cases, however, shows that many charges which have been adjudged actionable *per se* are not included in either of these classifications. It is conceived, therefore, that there should be added to the classes of words actionable *per se*, mentioned by Mr. Townshend and Judge Clifford, still another, including charges which, in particular localities, are by common consent, deemed so exceptionally disgraceful and damaging that the courts will take judicial notice of their injurious nature. This class will embrace charges like those mentioned in the South Carolina cases above cited.

WORDS IMPUTING CRIME.—The rule laid down in *Brooker v. Coffin*, 4 Am. Dec. 337, with reference to slanderous charges of crime, is that which is adopted in the principal case, and which prevails in most of the states. In delivering the opinion in that case, Spencer, J., uses the following language: "Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable." The editors of American Lea. Cas. in their valuable note to *Brooker v. Coffin*, 1 Am. Lea. Cas. 86, say that the court seem to have "reached the true principle;" and Mr. Justice Clifford, in *Pollard v. Lyon*, 91 U. S. 234, referring to this statement, says: "We are inclined to concur in that conclusion." The doctrine of *Brooker v. Coffin*, has been extensively followed in New York and in many other states. The following are some of the cases in which the principle has been approved and applied: *Widrig v. Oyer*, 13 Johnson, 124; *Martin v. Stillwell*, 7 Am. Dec. 374; *Case v. Buckley*, 15 Wend. 327; *Bissell v. Cornell*, 24 Id. 354; *Young v. Miller*, 3 Hill, 21; *Crawford v. Wilson*, 4 Barb. 504; *Anonymous*, 60 N. Y. 262; *Hillhouse v. Peck*, 2 Stew. & Port. 295; *Johanson v. Morrow*, 9 Port. 525; *Dudley v. Horn*, 21 Ala. 379; *Heath v. Devaughn*, 37 Id. 677; *Berdeaux v. Davis*, 58 Id. 611; *McCuen v. Ludlum*, 17 N. J. L. (2 Harr.) 12; *Johnson v. Shields*, 25 Id. (1 Dutch.) 116; *Giddens v. Mirk*, 4 Ga. 364; *Kinney v. Hosea*, 3 Harr. (Del.) 77; *Taylor v. Kneeland*, 1 Doug. (Mich.) 68; *Andres v. Koppenheafser*, 8 Am. Dec. 647; *Gosling v. Morgan*, 32 Pa. St. 275; *Stitzell v. Reynolds*, 59 Id. 488; *Alfefe v. Wright*, 17 Ohio St. 238; *Hollingsworth v. Shaw*, 19 Id. 430; *Davis v. Brown*, 27 Id. 326; *Gage v. Shelton*, 3 Rich. (S. C.) 242; *Montgomery v. Deeley*, 3 Wis. 709; *Ranger v. Goodrich*, 17 Id. 78; *Filber v. Dautermann*, 26 Id. 518; *Hoag v. Hatch*, 23 Conn. 585.

IN MINNESOTA the principle is rather loosely stated thus: "The rule is that words charging a person with having committed an act for which, if the charge were true, he would be punishable criminally by indictment are actionable *per se*." *St. Martin v. Desmoyer*, 1 Minn. 156. It is probable that the court meant to adopt the doctrine of the New York decisions, as the authorities to which they refer are "*Young v. Miller*, 3 Hill, 21, and the cases there cited." The doctrine of *St. Martin v. Desmoyer*, 1 Minn. 156, is approved in *McCarty v. Barrett*, 12 Id. 494.

THE RULE IN MASSACHUSETTS is thus laid down by Parker, C. J., in *Müller v. Parish*, 8 Pick. 384: "Whenever an offense is charged, which, if proved, may subject the party to a punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable." This doctrine is fully approved in *Brown v. Nickerson*, 5 Gray, 1. In *Bloss v. Tobey*, 2 Pick. 320, it is said that the words used, in order to be actionable, must import "a charge of some punishable offense; and in *Dunnell v. Fiske*, 11 Met. 551, that they must charge "some crime or offense punishable by law." Indeed it seems to be regarded in that state as sufficient if the language used "conveys a criminal imputation," without reference to the turpitude of the offense charged, or the nature of the punishment: *Buckley v. O'Neil*, 113 Mass. 193. So in New Hampshire it is held that to charge one with "a crime punishable by law" is actionable *per se*: *Tenney v. Clement*, 10 N. H. 52; *Glines v. Smith*, 48 Id. 259. In Illinois, in the case of *Strauss v. Meyer*, 48 Ill. 385, the court adopted Bouvier's definition of words actionable *per se*, that they must impute the guilt of some offense by which the party, if guilty, might be indicted and punished by the criminal courts.

THE COURTS OF IOWA seem to have approved both *Brooker v. Coffin*, 4 Am. Dec. 337, and *Miller v. Parish*, 8 Pick. 385, as containing correct statements of the rule that should govern in determining the actionability of words. In *Cox v. Bunker*, Morr. 269, decided in 1844, Williams, J., says: "The rule which has been adopted in the case of *Miller v. Parish*, 8 Pick. 385, is the proper one," quoting the language of Parker, C. J., given above. Referring to the same case the court said in *Abrams v. Foshee*, 3 Iowa, 274, decided in 1856, that it contained, perhaps, "as correct, and at the same time as brief a statement of the general rule, as has been given." In the interval between these two cases, however, was *Burton v. Burton*, 3 G. Gr. 316, decided in 1851, in which the court said: "We believe the true rule by which to test whether defamatory words are actionable *per se* is to be found in the case of *Brooker v. Coffin*, 5 Johns. 188. In that case it is held that if the charge being true will subject the party charged to an indictment, for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable." In *Estes v. Carter*, 10 Iowa, 400, it was decided that it was not actionable without proof of special damage to charge one with an offense at common law, not indictable and punishable by the laws of that state, and this ruling was approved in *Lucas v. Flinn*, 35 Id. 9.

THE DOCTRINE OF THE MARYLAND COURTS on this subject is stated in a recent case, *Griffin v. Moore*, 43 Md. 246, as follows: "Whatever may be the law elsewhere, it is well settled in this state that in an action like the one now under consideration [the action was for slander for charging a married woman with adultery], in order to constitute words actionable *per se*, they must impute to the plaintiff an indictable offense for which corporal punishment is the immediate penalty."

THE VERMONT COURTS seem to adopt the statement of the rule given by Chief Justice De Grey, in *Onslow v. Horne*, 3 Wils. 177. In delivering the opinion of the court in *Kimms v. Stiles*, 44 Vt. 351, Royce, J., said: "The rule whereby courts of justice have governed themselves in order to determine words spoken of another to be actionable is, that the words must contain an express imputation of some crime which is punishable—some capital offense or other infamous crime or misdemeanor, and the charge upon the person spoken of must be precise: *Onslow v. Horne*, 3 Wilson, 177."

THE TENNESSEE DOCTRINE is thus stated in *Rodgers v. Rodgers*, 11 Heisk. 757: "Words to be the subject of an action for slander, no special damage being alleged, must impute a crime for which the party, if guilty, would be punishable criminally on presentment or indictment, or a misdemeanor, involving moral turpitude, and for which an indictment or presentment would lie: *Smith v. Smith*, 2 Sneed, 473."

THE RULE IN MISSOURI is similar to that adopted in Maryland, and is thus stated by the court in *Birch v. Benton*, 26 Mo. 153: "As the result of our examination we think the rule that is safest and most certain in its application is that words are in themselves actionable which impute an indictable offense for which corporal punishment may be inflicted as the immediate punishment and not as the consequence of a failure to satisfy a pecuniary penalty." To the same effect is *Rammell v. Otis*, 60 Mo. 365.

IN SEVERAL OF THE STATES it is provided by express statute what words shall be deemed actionable *per se*. Thus in California, Civ. Code, sec. 46; Indiana, 2 Rev. Stat. (G. & H.) 333; Georgia, Code of 1873, sec. 2977, 2988; Mississippi, Rev. Code of 1871, sec. 1973. And in several other states there are statutory provisions making certain charges actionable which would not be so in the absence of such provisions. Thus, in Tennessee, Illinois, Arkansas, Missouri, North Carolina and Florida, charges of adultery and fornication are made actionable.

THE GENERAL RULE, including the greater number of the adjudged cases, is, as laid down in *Brooker v. Coffin*, 4 Am. Dec. 337, that words are actionable *per se* if they impute to another an offense which is indictable and which either involves moral turpitude or is punishable by degrading penalties. Under this head of course are included charges of felony generally which are everywhere and always deemed actionable. The cases, however, which occasion most difficulty, are those of mere statutory offenses and misdemeanors, and it is in such cases that the rule stated in *Brooker v. Coffin* is made serviceable. In every case of this kind the inquiry is: Does the offense charged involve moral turpitude? If not, is it an offense which would subject the perpetrator to infamous punishment?

OFFENSES INVOLVING MORAL TURPITUDE.—Among offenses which have been deemed to involve moral turpitude are: Removing landmarks: *Todd v. Rough*, 1 Serg. & R. 18; *Young v. Miller*, 3 Hill, 24; *Dial v. Holter*, 6 Ohio St. 228; bribing electors: *Hoag v. Hatch*, 23 Conn. 585; publishing an obscene caricature or libel: *Viele v. Gray*, 10 Abb. Fr. 1; attempting to commit larceny: *Bordeaux v. Davis*, 58 Ala. 611; altering owner's marks on animals: *Perdue v. Burnell*, Minor, 138, but otherwise as to marking another's animals in one's own mark: *Johnston v. Morrow*, 9 Port. 525; secreting of testator's goods by administrator: *Beck v. Stitzel*, 21 Pa. St. 522; attempting to corrupt jury: *Gibbs v. Dewey*, 5 Cow. 503; giving medicine to produce an abortion: *Füher v. Dautermann*, 26 Wis. 518; forging a petition to the legislature: *Alexander v. Alexander*, 9 Wend. 141; keeping bawdy-house: *Martin v. Stillwell*, 7 Am. Dec. 374; *Wright v. Paige*, 36 Barb. 438; *Lippstadt v. Lippstadt*, 52 Ind. 273; selling liquor to a slave: *Smith v. Smith*, 2 Sneed, 473. Offenses which have been deemed not to involve moral turpitude are: wife-beating: *Dudley v. Horn*, 21 Ala. 379; selling of personal property by wife of joint-owner: *Rodgers v. Rodgers*, 11 Heisk. 557; taking away standing corn: *Stitzell v. Reynolds*, 59 Pa. St. 488; trading with slaves: *Heath v. Devaughn*, 37 Ala. 677; breaking open and reading a letter sent by mail: *Hillhouse v. Peck*, 2 Stew. & Port. 395; *McCuen v. Ludlum*, 17 N. J. L. (2 Harr.) 12.

INFAMOUS PUNISHMENT.—In strictness an infamous punishment is one which renders the person upon whom it is inflicted perpetually incompetent as a witness. The term is thus explained by Bouvier, *ec.* "Punishment." "Punishments are infamous or not infamous. The former continue through life, unless the offender has been pardoned, and are not dependent on the length of time for which the party has been sentenced to suffer imprisonment; a person convicted of a felony, perjury, and other infamous crimes, cannot, therefore, be a witness, nor hold any office, although the period for which he may have been sentenced to imprisonment, may have expired by lapse of time." Hence, properly speaking, no punishment is infamous which does not subject the offender to permanent civil disabilities. But this is not the sense in which the term is used in many of the cases in which infamous punishment is adopted as the criterion for determining whether a charge of crime is actionable or not. In the majority of such cases the word "infamous" is employed as a synonym for "corporal," and the latter again is held, to embrace imprisonment of every kind which is punitive in character. Hence it is held that where the punishment for a crime is, in the first instance, imprisonment, with or without hard labor, either in a penitentiary, house of correction or common jail, it is actionable *per se* to charge one with such offense: *Wilcox v. Edwards*, 5 Blackf. 183; *Birch v. Benton*, 26 Mo. 153; *Rammell v. Otis*, 60 Id. 365; *Griffin v. Moore*, 43 Md. 246; *Billings v. Wing*, 7 Vt. 439; *Miles v. Oldfield*, 2 Am. Dec. 412; *Elliot v. Ailsberry*, 5 Id. 631. On the other hand it was held in *Hillhouse v. Peck*, 2 Stew. & Port. 395, and *Heath v. Devaughn*, 37 Ala. 677, that "fine and imprisonment do not constitute an infamous punishment," and that, therefore, it is not actionable *per se* to charge a person with a crime, not involving moral turpitude, which is punishable by such penalties.

OFFENSE WHERE TRIABLE.—It is further to be noted that in order to be actionable *per se*, the charge must be of the commission of an offense triable and punishable in the ordinary courts of law: *Townshend on Slander and Libel*, sec. 160. Hence it has been held not actionable to call one a "deserter," since desertion is a crime cognizable only in a court-martial: *Hollingsworth v. Shaw*, 19 Ohio St. 430.

OFFENSE MUST BE POSSIBLE.—To be actionable *per se*, the charge must also impute an offense which appears to be legally possible. Therefore, to charge larceny of something which is not legally a subject of larceny, is not actionable; as a charge of stealing trees: *Cock v. Weatherby*, 13 Miss. (5 Sm. & M.) 333; or marl: *Oyden v. Riley*, 14 N. J. L. (2 Gr.) 186; or windows from a house: *Wing v. Wing*, 66 Me. 62. So a charge of perjury committed under an unconstitutional and void act of the legislature: *Burkett v. McCarthy*, 10 Bush, 758; or before a magistrate having no jurisdiction: *Hamm v. Wickline*, 26 Ohio St. 81; or in a proceeding in which false swearing is not legally punishable: *Pegram v. Stoltz*, 76 N. C. 349; or in an extra-judicial affidavit: *Shaffer v. Kintzer*, 2 Am. Dec. 488. So a charge of "robbing" a town: *McCarthy v. Barrett*, 12 Minn. 494. But it is actionable to charge one with the commission of a crime the *corpus* of which never existed: *Colbert v. Caldwell*, 3 Grant's Cas. 181; as by accusing one of the murder of a person who is yet alive, if the bystanders supposed him to be dead: *Sugart v. Carter*, 1 Dev. & Bat. (N. C.) 8; *Eckart v. Wilson*, 10 Serg. & R. 44; or by accusing one of perjury in a legal proceeding which never took place: *Brucker v. Potts*, 12 Pa. St. 200.

OFFENSES NOT INDICTABLE.—It is a general principle that however disgraceful and heinous an offense against public morals may be, if it is not

indictable and punishable under the law, it is not actionable to charge one with its commission. In several cases it has been held, in accordance with the decision in *Coburn v. Harwood*, that to charge one with the crime against nature, hideous and disgusting as that crime is, is not actionable if the statute provides no punishment for it: *Estes v. Carter*, 10 Iowa, 400; *Davis v. Brown*, 27 Ohio St. 326. So, of the crime of incest in Tennessee, when there was no statute providing for its punishment: *Eure v. Odom*, 2 Hawks, 52.

ACTIONABLE WORDS NOT IMPUTING CRIME.—But although the courts generally adhere to the rule, that in order to make a charge against a private person actionable, it must either impute some punishable crime or some offensive disease, it is undeniable, that in certain instances they have been influenced by local public opinion to hold charges to be actionable which fell within neither of these classes. The South Carolina cases holding it actionable falsely to call one a negro or mulatto, have already been mentioned. To the same class of decisions belong certain cases in one or two of the states holding it actionable *per se* to charge a chaste woman with fornication or adultery, even where no legal penalty or nothing more than a fine is affixed to those offenses. It is the firmly established doctrine in Iowa, that such charges are actionable: *Cox v. Bunker*, Morr. 269; *Dailey v. Reynolds*, 4 G. Gr. 354; *Abrams v. Foshee*, 3 Iowa, 274; *Smith v. Silence*, 4 Id. 321; *Truman v. Taylor*, Id. 424; *Beardsley v. Bridgman*, 17 Id. 290; *Cleveland v. Detweiler*, 18 Id. 299; *Snediker v. Poorbaugh*, 29 Id. 488. The principle of these decisions is thus stated by Wright, C. J., in *Truman v. Taylor*, 4 Iowa, 424: "We need scarce remark that our conclusion that the words spoken are actionable *per se* is not upon the ground that they import a charge of some punishable offense or crime, but upon the simple, and as we think, salutary ground that words imputing to the female a want of chastity are actionable without any proof of special damage. However much other, and perhaps a majority of states, may have hesitated in adopting this rule, in ours, at least, it may now be regarded as settled." Similarly in Ohio, *Wilson v. Robbins*, Wright, 40; *Reynolds v. Tucker*, 6 Ohio St. 516. And on similar grounds it was held in *Malone v. Stewart*, 15 Ohio, 319, that it was actionable *per se* to charge a woman with being a hermaphrodite. The court said: "We hold it a sound principle of law, that words spoken of a female, which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable in themselves." This extraordinary doctrine has not, however, been extended to any other classes of cases in that state. It hardly needs to be stated, that, except where it is otherwise provided by statute, or where the punishment of fornication and adultery is such as to bring them within the rule of *Brooker v. Coffin*, charges of those offenses are not deemed actionable *per se*: *Buye v. Gillespie*, 3 Am. Dec. 404; *Bradt v. Towsley*, 13 Wend. 253; *Linsney v. Maton*, 13 Tex. 449; *W. v. L.*, 2 Nott & McCord, 204. So, in the District of Columbia, where, perhaps, for prudential reasons, fornication has not been made punishable at law: *Pollard v. Lyon*, 91 U. S. 225.

INNUEENDO, OFFICE OF.—It is well settled, in accordance with the doctrine of the principal case, that the office of the innuendo is merely explanatory, and that it cannot be made to take the place of a colloquium, or to extend or vary the meaning of defamatory words: *Townshend on Slander and Libel*, sec. 335, 336, 337; *Shaffer v. Kintzer*, 2 Am. Dec. 488; *Sheely v. Biggs*, 3 Ll. 552.

CHARGES OF CRIMES IN ANOTHER STATE are discussed, and the law relating to them examined in *Shipp v. McCraw*, 9 Am. Dec. 611, and in the note thereto.

A CHARGE OF DRUNKENNESS AGAINST A MINISTER is actionable *per se*; *McMillan v. Birch*, 2 Am. Dec. 426; *Chaddock v. Briggs*, 7 Id. 137; *Hayner v. Cowden*, 27 Ohio St. 292. Other instances of actionable slander will be found in *Lewis v. Hawley*, 2 Am. Dec. 121; *Nye v. Otis*, 5 Id. 79; *Walton v. Singleton*, 10 Id. 472; *Miles v. Oldfield*, 2 Id. 412. The law as to what is necessary to make a charge of false swearing actionable is discussed in its various phases in *Hopkins v. Beedle*, 2 Am. Dec. 191; *Rue v. Mitchell*, 1 Id. 258; *Pelton v. Ward*, 2 Id. 251; *Shaffer v. Kintzer*, 2 Id. 488; *Ward v. Clark*, 3 Id. 383; *Sheely v. Biggs*, 3 Id. 552; *McClaghry v. Wetmore*, 5 Id. 194.

FUGUA v. CARRIEL.

[MINOR, 170.]

JUDGMENT *nunc pro tunc* may be entered without notice.

A NOTE PAYABLE WITH INTEREST from date, if not punctually paid when due, carries interest from maturity only.

ACTION on a promissory note, payable one year from date, "to bear interest from the date if not punctually paid." Judgment was taken by default; but at the next term after the entry thereof, the entry was amended and judgment *nunc pro tunc* entered, including interest from the date of the note. A writ of error was then prosecuted.

Coalter, for the plaintiffs in error.

Martin, *contra*.

By Court, CRENSHAW, J. We have no hesitation in saying that the circuit court had power to enter a judgment *nunc pro tunc*; and that under the circumstances of this case, notice to the opposite party was not necessary; for if there was any mistake in entering the judgment, it was a mistake apparent from the record, and the amendment was made at the earliest opportunity after its occurrence, viz., at the first term after the judgment. But the judgment, as the entry stands amended, appears to include interest from the date to the maturity of the note. This in an instrument of this description is in the nature of a penalty, and not recoverable, as has been settled at this term: *Dinsmore v. Hand*, 126. On this ground the judgment must be reversed, and judgment rendered here for the principal and interest thereon from the maturity of the note. In this opinion the court are unanimous

NUNC PRO TUNC ENTRY WITHOUT NOTICE.—"In Alabama the application to enter judgment *nunc pro tunc* may be made without notice: *Fugua v. Carriel*, Minor, 170; *Allen v. Bradford*, 3 Ala. 281; *Glass v. Glass*, 24 Id. 468. This rule is proper enough in that state and in all others where the motion must be determined from an inspection of the records. But whenever the application calls for an investigation by the court outside of its records to determine either the existence or the terms of the alleged judgment, notice to the adverse party is proper and necessary:" Freeman on Judgments, sec. 64.

INTEREST.—The law relating to the subject of interest is examined at length in the note to *Selleck v. French*, 6 Am. Dec. 188.

ANDREWS v. BAGGS.

[MINOR, 173.]

CONDITIONAL ACCEPTANCE.—Where the drawees of a bill of exchange accepted the same, to be paid when they had funds of the drawers in their hands, to charge the latter, proof that the acceptors had received funds of the drawers must be made as well as that demand and notice of non-payment had been given.

A PROMISE TO PAY MONEY, made under no mistake as to the promisor's legal liability, will support an action of assumpsit.

ASSUMPSIT by Baggs, Cochran & Co. against Andrews and Harrison, the drawers of a bill of exchange in plaintiffs' favor. It appeared that the bill had been presented for acceptance upon the trustees, who said that they had not sufficient funds at the time to pay the order and therefore made their acceptance payable when they should be in funds. The bill was afterwards presented to Andrews who was told that the same was unpaid, and who replied that it was the duty of the trustees to pay it, but that as they did not he would try and settle it himself. It appeared that the trustees were indebted to the drawers. One of the trustees testified that to the best of his knowledge the bill had not been presented to them for payment. Defendants' counsel moved the court to instruct the jury that to entitle the plaintiffs to recover they must prove demand, non-payment and notice. This instruction was refused and the jury directed, that, if from the evidence they believed that the trustees had no funds of the drawers in their hands when the bill was drawn, nor at any time since, the plaintiffs were not bound to make demand of payment and give notice, and that, if they believed that the defendants without any mistake of their legal liability had assumed the payment of the money to the plaintiffs, they should find for the plaintiffs.

McKinley, for the plaintiffs in error.

Coalter, contra.

By Court, *MINOR, J.* As to the bill of exceptions. The last part of the instructions to the jury, "that, if from the evidence, they believed that the defendants had assumed the payment of the money, without any mistake as to their legal liability," we conceive to be correct, but to this part of the charge only, the many authorities cited for the defendants in error apply. On the issues joined, and evidence given, the implied as well as express assumpsit was to be tried, and the court could not determine whether the verdict would be found on the evidence of one or the other. Admitting that the drawer is chargeable without notice, if at the time of drawing he has no effects in the hands of the drawee, what were here the effects of Andrews and Harrison in the hands of the drawees? Not the company's funds which their agents or trustees might then have in possession, but the money which the company owed to the drawers. Andrews and Harrison endeavor, by the bill, to transfer a part of this money into the hands of Baggs, Cochran & Co. If their bill was not paid, notice was surely as necessary as in any other case, in order that they might take the necessary steps to collect the debt due to them from the drawees: *Chitty on Bills*, 257; 2 Bos. & P. 280.

The case seems to have been considered as if the effects of the drawers in the hands of the drawees, and the funds of the company in the hands of their trustees, were here convertible terms. The bill does not appear to have been drawn with reference to the circumstance of the trustees having or not having funds of the company in hand. If the drawee be wholly insolvent, the drawers for obvious reasons, is still entitled to notice. The holders were not bound to receive the conditional acceptance; having received it, they must abide by its terms. If they would have charged the drawers as in case of non-acceptance; they should have given them immediate notice of the terms of the acceptance offered: *Chitty on Bills*, 235, 271.

For these reasons we think that the circuit court erred in instructing the jury "that if from the evidence they believed that the trustees had not funds of the company in their hands when the order was drawn, or at any time since, the plaintiffs were not bound to demand payment of the acceptor, or give notice to the defendants." Nor should we think that instructions, as asked by the defendants, would have been correct, inasmuch as by such charges, the jury might have been induced to lay out of view all the evidence as to the promise of Andrews, and to consider the demand and notice of non-payment as the sole

ground of liability. As to this, the charge should have been, that the plaintiffs, to recover solely on the implied assumpsit, and independent of the express assumpsit charged, must have proved that after the acceptors had received funds of the company sufficient to pay the bill according to the terms of their acceptance, the holders had demanded payment, and given to defendants legal notice of non-payment. In this opinion the court are unanimous.

The judgment must be reversed, and the cause be remanded.

ELLES, J., not sitting.

MALONE v. HAMILTON.

[MINOR, 286.]

A CONVEYANCE WITH POWER TO SELL certain slaves, pay the proceeds in discharge of four notes, and return the surplus to the grantor, the deed to be void in case the notes are punctually paid, is not fraudulent *per se*, although the grantor remain in possession.

APPEAL. A *fi. fa.* had issued in favor of Hamilton and against Smoot, and was levied upon certain slaves. The appellants, Malone and Lyon, claimed property in the slaves by virtue of deed from Smoot to them in trust, to sell the slaves for the benefit of the Tombeckbee bank. The deed set forth that to secure the payment to the bank of four notes, particularly described, and in consideration of one dollar, Smoot bargained and sold to the appellants the slaves, "in trust to pay and satisfy from the proceeds of said property the debts as aforesaid, as the installments on the same may become due; and for that purpose the said Thomas Malone and James G. Lyon are, and each of them is, hereby vested with power to sell the aforesaid property at public sale to the highest bidder, etc.; and the money arising from the sale to apply to the payment of the said installments of the said debts, after deducting the necessary expenses, and the surplus, after paying the debts, to refund to Alexander B. Smoot. But if the installments of said debts shall be punctually paid as they become due, and the whole of said debts be extinguished, then this indenture to be void." It appeared that the slaves had continued in Smoot's possession, and it did not appear that there had been any actual delivery to the appellants. The notes were *bona fide* due to the bank. The slaves were levied on on the fifth of February, 1823. The deed was dated on the twenty-second of March,

1822, and recorded on the twenty-first of May following. The jury were charged that the deed was *per se* fraudulent, and that the trust reserved to the benefit of Smoot made it fraudulent. The appellants excepted.

Crawford, for the appellants.

Salle, *contra*.

By Court, MINOR, J. It does not seem necessary in this case to consider whether an absolute deed of conveyance of personal property, the possession of which remains in the vendor, is fraudulent *per se*. From the face of the deed in question, it was not intended and could not be understood as an absolute deed of conveyance, but was obviously in the nature of a mortgage to secure and indemnify the Tombeckbee bank against a future contingency. The estate and power vested in the trustees were to be defeated, if the installments of the debts intended to be secured should be punctually paid: Co. Lit. 201. It is true the deed does not state in so many words that until a failure of payment possession shall remain in Smoot; nor is any power expressly given to the trustees to take possession immediately, and apply the hire and profits to the satisfaction of the debts; their powers are restricted to the purpose of satisfying the debts or installments thereof, as they should become due by public sale of the property in the manner prescribed. A part of the debts were not to fall due until ninety days after the making of the deed. The trustees were not entitled to take possession sooner than it should be necessary in order to carry the purposes of the trust into effect; and the separation of the possession from the title, under such circumstances, was evidently not incompatible, but perfectly consistent with the deed: 1 Cra. 309; *Powell on Mortgages*, 43, 44, 49; 2 T. R., 594-9; 9 John. 344 [*Sturtevant v. Ballard*, 6 Am. Dec. 281]; 1 Atkins, 167; 3 Cra. 73; 10 Ves. jun. 146.

From the provision of the deed that the surplus, after satisfying the debts and expenses, shall be paid to Smoot, it is not necessarily to be inferred that the conveyance was made with intent to delay, hinder, or defraud creditors. If this had not been expressed it would have been clearly implied. In either case the trustees would have been bound to pay the surplus to Smoot, unless his creditors interposed; and in the one case as in the other, they must, it would seem, have pursued their remedy in the same way, by resorting to equity to compel the

trustees to sell and account for the surplus, or by attaching the surplus in their hands as garnishees: 3 Cra. 73; 1 Burr. 478, 480; 5 Mass. 51; Laws Ala. 316.

It is the unanimous opinion of the court that the judgment of the circuit court must be reversed, and the cause be remanded.

RETENTION OF POSSESSION BY VENDOR.—The effect of retention of possession of chattels by a vendor or mortgagor after a sale or mortgage of them as to rendering the transaction fraudulent is discussed in *Sturtevant v. Ballard*, 6 Am. Dec. 281, and note; *Clow v. Woods*, 9 Id. 346, and note. Other cases on the same subject are *Clayborn v. Hill*, 1 Am. Dec. 452; *Hodges v. Blount*, Id. 563; *Barrow v. Paxton*, 4 Id. 354; *Brooks v. Powers*, 8 Id. 99; *Patten v. Smith*, 10 Id. 166; *Mason v. Barker*, Id. 724.

POPE v. NANCE.

[Minor, 299.]

WHERE THE NOTE OF A THIRD PERSON, received by the creditor in payment of his claim, proves to be forged, he cannot maintain an action on the original consideration, unless, as soon as the forgery is discovered, he offers to return the note, or unless he has exhausted his remedies upon it with due diligence.

ASSUMPSIT. The opinion states the case.

Hopkins and McKinley, for the plaintiffs in error.

Hutchinson and Clay, contra.

By Court, LIPSCOMB, C. J. In this case the facts, so far as they are considered material, seem to be, that Pope and Hickman purchased from William Davis sundry negroes, and in part payment gave their note, dated sixth of February, 1819, for six thousand six hundred and sixty-two dollars, payable to John Brahan or order nine months after date. Brahan indorsed the note in blank, and Davis indorsed it to John Nance & Co., the defendants in error. In the spring of 1819 the partnership of Pope and Hickman was dissolved, and Hickman assigned all his interest in the partnership effects to Pope. In December, 1819, John R. Lucas, one of the firm of Nance & Co., with a full knowledge that the partnership of Pope and Hickman had been dissolved, applied separately to Pope for payment of the note. An agreement was made between them that Lucas should take the note of S. D. Hutchings & Co. and Simon Turner indorsed by Egbert Harris for six thousand four hundred and eight dollars, dated the twenty-second day of December, 1819,

payable first of August, 1820. Lucas accordingly received this note and the balance of the money from Pope, and gave up to him the note of Pope and Hickman, which Pope canceled by striking a pen across the signatures, and so canceled it remained in his possession. Pope declared that he would not be responsible for the solvency of the maker or indorser of the note paid over, and refused to indorse it, but represented Hutchings & Co. to be merchants in good credit, and Turner and Harris to be respectable planters. At the maturity of the note Lucas, as assignee of Harris, instituted suit against Hutchings and Bradford, his partner, and against Turner. The suit abated as to Hutchings, by his death. Judgment by default was recovered against Bradford. Turner plead that he did not execute the note, supporting his plea by affidavit, and on that plea verdict and judgment were rendered in his favor. Before the commencement of this suit, Pope was apprised that Turner had alleged that his signature was forged, and had agreed that it would be well to bring suit, but made no acknowledgment of his liability. There is no evidence of fraud on his part, so far from it, there is evidence that he had offered the cotton to Lucas, on the sale of which afterwards made to Hutchings & Co. he received the note which he transferred to Lucas. No notice of demand and non-payment, etc., was given to Harris the indorser. No proceedings were had against the representatives of Hutchings, and after the judgment by default against Bradford no further steps were taken against him. On the trial of the case at bar in the court below the presiding judge charged the jury that if they believed from the testimony that the signature of Turner was a forgery, and that the note was given in payment of the debt of Pope and Hickman, they must find a verdict for the plaintiff. Exceptions to this charge, and several other bills of exceptions were taken on the trial, and the various points growing out of them have been argued. But such of them as will affect the decision of the case can be examined under this bill of exceptions to the judge's charge.

In the outset of this examination I must declare that my researches for a case in point have been unsuccessful; but in cases analogous to this, principles have been laid down which I believe will, when applied to this, relieve it of every difficulty. The adjudged cases all go to support this rule: that where the note of a third person received in payment of a precedent debt proves to be a forgery, an action will lie on the original consideration as though no payment had been made;

but this right of action is under these qualifications: the note must be returned as soon as the forgery is discovered. The plaintiff must place the defendant in the same condition as to his rights on the forged note that he was in when he made payment of it. If the defendant acted in good faith, although the note paid may be a forgery, he is discharged from all liability if the plaintiff has not performed these pre-requisites.

Put this case on the strongest ground for the plaintiffs in the action, that the note paid was an entire forgery, it was incumbent on them to return or tender it to Pope as soon as the forgery had been discovered. Turner had refused payment, alleging that his signature was forged. This should have warned the plaintiffs to act with circumspection, and to avoid everything like negligence on their part. But Lucas, as assignee of Harris, without offering to return the note to Pope, instituted suit on it. Pope and Hickman should have been placed in the condition in which they were when they paid it away. Notice of the non-payment by the makers was not given to Harris, and by this neglect he has been relieved from all liability to the holders, or to Pope and Hickman, to whom he was originally liable as indorser. It will thus be perceived that it is impossible that Pope and Hickman can be restored to the condition in which they were when they transferred the note; and if they cannot, they are discharged from all liability as the case stands on this record. Again, although the name of Turner is a forgery, it does not necessarily follow that the note was of no value. It does not appear from the record that Hutchings and Bradford were insolvent, or that the money might not have been collected from them. In the cases in the books where bills of exchange have been accepted and paid away in a discharge of precedent debts, and it was afterwards discovered that the drawer's name was forged, it has been held that the acceptor is not discharged; and that if the holder does not return the bill as soon as the forgery is discovered, he is supposed to rely on the acceptor, and the party who paid it away is wholly discharged. Here the name of one of the makers only is forged, and the instrument is not wholly void. The liability of Hutchings & Co., and of Harris, was not destroyed by the forgery of Turner's name. The plaintiffs in the action were bound to use due diligence in protecting the interests of the defendants, as well as their own, in the note transferred.

There can be no doubt that the transfer of the note was

intended as a payment and not as a security for the payment of the precedent debt. Why was the note of Pope and Harris given up to be canceled? Why did Pope refuse to indorse it? Why pay in money the balance of the original debt? Why did Lucas, after discovering that Turner's name was forged, go on to sue in his own name? All these circumstances go to show conclusively the intention of the parties to consider it a payment.

It seems, then, that the charge of the judge on the trial in the circuit court was erroneous. It is the unanimous opinion of the court that the judgment be reversed, and that the cause be remanded.

ELLIS, J., not sitting.

PAYMENT ON FORGED BILLS is a nullity: *Markle v. Hatfield*, 3 Am. Dec. 446.

PITCHER v. PATRICK.

[MINOR, 321.]

A DEBT DUE ONE of two joint obligors may be set off under their joint plea in an action of debt brought by the administrators of the obligee on the joint bond.

DEBT. The opinion states the case.

Barton and Pickens, for the plaintiffs.

H. G. Perry, contra.

By Court, MINOR, J. This was an action of debt on the joint bond of Pitcher and Remsen to Isaac Patrick. Issues were joined, and a trial had on their joint pleas of payment and set-off. On the trial they offered to prove and set off a debt due by open account from the intestate to Remsen. This evidence was rejected, a bill of exceptions taken, and the matter thereof is now assigned as error. It has been held that in an action against two on their joint note, the individual demand of either may be set-off: 2 Tyler's Rep. 391. In an action against one obligor, a set-off or discount in right of the other shall be allowed: 2 Bay, 475. I am not informed of the extent of the statute as to set off in the states where these decisions were made, and therefore cannot say what weight these decisions should have here; but I cannot find any case, either in the British or American reporters, in which this principle is denied or its force weakened.

The plain object of a set-off is to determine the rights of the parties in one instead of two actions. The plea or evidence of the set-off is to be tested by its mutuality with the claim set up in the declaration. There can be no doubt that the evidence would have been admissible in an action on this bond against Remsen separately; that a judgment for Remsen on such a plea would have been a bar to an action against his co-obligor; and that a payment by him would discharge Pitcher. Though Patrick may have taken the joint bond without any view to Remsen's demand against him, and relying on Pitcher only, it can make no difference. Mutual credit can be constituted though the parties do not mean particularly to trust each other, as when the note, etc., of plaintiff is assigned to defendant before the commencement of the action: 3 T. R. 507; 8 John. 118; 1 East, 375. So, though the demand were originally joint, if it afterwards becomes separate, as in action by a surviving partner, a separate debt due from him is a good set-off: 5 T. R. 493. So a debt due from *cestui que trust* in an action by trustees: 3 Cra. 342; 1 T. R. 621; and courts of law, on motion, have set off a judgment in favor of defendant and another against the plaintiff, in satisfaction of plaintiff's judgment against defendant separately: 6 Bac. Ab. 137; 2 Com. Dig. 105; 4 T. R. 1238.

In the case at bar, the money, if recovered, would be assets in the hands of the administrators, and liable to the very demand Remsen now offers to set off. A judgment for the administrators in this action would render him liable to pay that which, on his demand now offered to be set off, he may be entitled to recover back. Why should the parties be required to resort to two actions to settle that which can be as well determined in one? Can there be any doubt that Remsen, if not permitted to prove and set off his demand in this action, would be protected by a court of chancery from the judgment to the amount of Patrick's debt to him? Or that the joint debt so extinguished as to Remsen, would not be extinguished as to Pitcher also? But it has been urged that our statute, as to set-off, requires the jury, if they find that the plaintiff's debt is by the set-off overpaid, to certify how much the plaintiff is indebted over and above the sum by him demanded, which sum so certified shall become a debt of record, etc.: Laws Ala. 457; and as the excess, if found, could not here be certified as a debt due to both defendants, testimony should not go to the jury upon which they could not find and certify as required by

the statute. The defendant, in an action by the assignee of a note, etc., is to have the benefit of all discounts and set-offs possessed or had previous to the notice of the assignment: Laws Ala. 69. In such action a debt due from the original payee of the note could unquestionably be pleaded and proved; yet an excess in favor of defendant could not by the finding of the jury be made a debt of record either against the plaintiff or against the payee, who was not a party in the action. The provision as to certifying the excess due to defendant was for his benefit; it does not exclude him from the benefit of the set-off, though he may not be able to have the balance certified. It is our unanimous opinion that the judgment of the circuit court be reversed, and the cause remanded.

LIPSCOMB, C. J., not sitting.

Approved and followed in *Clark v. McElroy*, 1 Stew. 147; *Ges v. Nicholson*, 2 Id. 512; *Carson v. Barnes*, 1 Ala. 93; *Winston v. Metcalfe*, 6 Id. 756; *Mitchell v. Burt*, 9 Id. 226; *Jones v. Jones*, 12 Id. 244; *Sledge v. Swift*, 53 Id. 110.

See note to *Gregg v. James*, post.

WHITE v. SAINT GUIRONS.

[MINOR, 231.]

THE SEAL AND SIGNATURE of the secretary of the treasury of the United States are sufficient authentication of the official acts of the secretary.

THE ACTS OF CONGRESS, as published in the pamphlet acts of the sessions, may be read in evidence without further proof.

TRESPASS TO RECOVER POSSESSION may be maintained on a contract between the owner of the fee and the plaintiff, by which the plaintiff was to take possession, make certain improvement within a given time, and then receive title in fee. Nor can a stranger resist a recovery on the ground that the plaintiff has not performed the conditions of the contract.

A RIGHT OF ENTRY AND POSSESSION are alone sufficient to sustain trespass. It is not necessary to prove actual possession or ouster; and the plaintiff may recover, though the defendant be in possession of less than is declared for.

DAMAGES FOR MESNE PROFITS may be recovered in trespass, as well as the possession.

TRESPASS brought by Saint Guirons against White for entering the plaintiff's close, and with force and arms expelling him therefrom. The *locus in quo* consisted of a section fully described in the allotment made to members of the French Association pursuant to the act of congress of March, 1817. Verdict for the plaintiff. Two bills of exceptions were filed. The

first was for the admission of a contract between the United States and one Villars, agent of the French emigrant, without proof of the official seal and signature of the secretary of the treasury department affixed thereto; and for the admission of the pamphlet acts of the sessions of congress without further authentication; and for refusing defendant's evidence offered to prove that plaintiff was not a French emigrant. The second bill was for refusing to charge the jury, as requested, that under the contract the plaintiff could not recover; and for refusing other instructions which appear from the opinion.

Clay & Pickins, for the appellant.

Stewart, contra.

By Court, SARROLD, J. By the first bill of exceptions, questions are raised as to the competency of evidence received on behalf of the plaintiff, and other evidence offered by the defendant, and rejected.

The contract, given in evidence, appears to have been signed by the secretary of the treasury of the United States, and authenticated by the public seal of that department. Such authentication, without any extrinsic aid, is sufficient. The treasury department, being an important public office of the government, the official acts of the secretary are to be recognised with full faith and credit in our courts. If aid, however, could be conceived necessary, the seal and the signature were proved by witnesses. As to the maps and list of allotments, direct reference is made to them in the contract, and they were a necessary part of it. Under the circumstances they were properly admitted. The judge was bound *ex officio* to know the act of congress, and there could be no error in hearing it read from the pamphlet in which the acts of the session were published.

From an examination of the acts of congress, under which the appellee claims, and which were cited in argument, the "act to set apart and dispose of certain public lands for the encouragement of the cultivation of the vine and olive," and the act supplemental thereto, it appears that the secretary of the treasury was vested with the sole and exclusive power of ascertaining the authority of the agent of the association; and that the secretary and this agent were to decide what persons came within the description of French emigrants as named in the act, and to make allotments among them. The contract and maps, etc., annexed, show that the allotments were so

made, and to whom, and it is conclusive as to those facts. Moreover, the supplemental act expressly recognizes Villars as the agent, and confirms and severs the right of the individuals. If the condition as to any other allotment than that of the appellee had not been performed, such failure could not affect his rights. Whether he had failed in the performance of the conditions as to his own allotment, was a question exclusively between him and the other party to the contract. The government might claim for a failure to perform the conditions, but a stranger to the contract has no right to intermeddle.

The second bill of exceptions is as to the instructions which the defendant on the trial moved the court to give to the jury, and which the court refused to give. By the act of congress, and the express terms of the contract, the four townships of land were appropriated to the use of the association of French emigrants. A sale was agreed on, and the price and terms fixed. Within three years a settlement was to be made by each individual on his allotment. Within seven years certain vegetable productions were to be planted and cultivated, and within fourteen years certain other conditions were required to be performed; and then, upon the payment of two dollars per acre, patents were to issue. It was agreed that the emigrants should not have a complete title, at law or in equity, until by a performance on their part, they should be entitled to patents. The immediate possession of the premises was a vital right, and was indispensable to the allottees to enable them to comply with their engagements with the government. They acquired, therefore, substantially by the spirit and actual stipulations of the contract, a right to enter, take, and retain possession of the lands for a limited time, absolutely and against the rest of the world. This right of possession vested immediately, and without any condition, for a term of years yet unexpired. They acquired also a right to the fee-simple, to vest in *futuro* on performance of conditions precedent.

The form of action has been substituted in this state for the common law action of ejectment, to try title to lands. A fee-simple was not necessary to sustain an ejectment. A tenant for years or for life, without expectation of the fee, could maintain it, and recover possession if withheld from him. In no view of the case can the appellee's estate be considered inferior to a lease for years. He has a present right, under the United States, in whom the fee resides, of entry and possession, and

that is sufficient, he is therefore entitled to the benefit of, and can maintain this action.

It is objected that no interest was acquired by the appellee, unless he made an actual settlement on his allotment within three years. The right passed by the grant remains unimpaired until the government shall in some way determine, or rescind the contract, or at least until the expiration of the time allowed for its fulfillment, and as before stated, this was a matter in which a stranger had no concern.

The objection that if a legal title vested in any one, it was in Villars only, is not well taken. He was an agent, the allotments were made individually, the titles of the allottees were severed by the supplementary act, if not without it. So that no one but the individual to whom the allotment was assigned could demand possession of it.

The objection that the plaintiff could not recover unless he had previously been in possession, and was ousted or debarred an entry is not available. Upon the principles and for the reasons already stated, neither is deemed to have been necessary. The fictions of lease, entry, and ouster, have no application to this form of action.

It remains to be examined if there was a misjoinder of causes of action, or error in rendering judgment as well for the mesne profits as for the possession of the land. The recovery of damages to the extent of the mesne profits is an appropriate object of the action of trespass. The statute of 1821 abolishes the fictitious proceedings in ejectment, directs that the mode of trying title to land, etc., shall be by action of trespass in which the plaintiff shall indorse on his writ that the action is brought as well to try titles as to recover damages, and that if the plaintiff shall recover he shall be entitled to an execution for possession as well as for costs and damages. To suppose that in extending the remedy by this form of action to the recovery of possession as well as damages, and that by the terms used in the statute the legislature intended to divest the action of trespass of any of its legitimate properties, would involve palpable inconsistency. The effect of such construction would be a partial redress to the plaintiff by the first judgment, and a second action immediately afterwards, and of the same nature to recover the residue.

Formerly, where a party was deprived or debarred the possession of his lands, his remedy was attended with unnecessary inconvenience and delay. By his action of ejectment, with all

its troublesome legal fictions, he might recover possession of the premises and nominal damages merely, and then had to resort to his action of trespass for the recovery of the meane profits, also under the name of damages; and in the last action the judgment in the first was an essential, and indeed the chief, matter of his evidence. The experience of the inconvenience of this mode of proceeding appears to have produced the statute of 1821, and to this statute such a construction should be given as will tend to suppress the mischief and advance the remedy; and indeed it would seem to be absurd that in an action of trespass brought under this statute, divested of all legal fiction, and charging an injury of magnitude, the recovery as to damages (whatever might be the evidence) should be limited to a nominal amount merely.

It is the unanimous opinion of the court that the judgment be affirmed.

GAYLE, J., not sitting.

Proof of Laws, see *State v. Twitty*, 11 Am. Dec. 779, and the note thereto.

WREN v. WARDLAW.

[Minor, 283.]

AN AVKEMENT OF SCIENTER is unnecessary in an action of assumpsit for breach of warranty of soundness.

PAROL EVIDENCE IS INADMISSIBLE in an action against two defendants for the breach of warranty of soundness of a slave, to prove that the slave was sold by both the defendants, it appearing from the bill of sale produced in evidence that the sale was by one only.

CASE against Wren and Glover for the breach of the warranty of soundness of a negro woman sold by them to Wardlaw. The declaration contained counts of *indebitatus assumpsit*, and *insimul computassent*. The bill of sale was produced in evidence. It was executed by Glover alone, and contained a warranty to make good right and title to the slave, but said nothing as to the soundness of the negro. The plaintiff then offered and was allowed to give parol evidence, against defendants' objection that the negro was sold to him by both the defendants. Verdict and judgment for the plaintiff. Errors were assigned: That the declaration did not allege that the defendants knew the slave to be unsound, or that the purchase was made in consequence of false and fraudulent representations made by the defendant or either of them; and that the court erred in receiving the parol evidence.

By Court, CRENSHAW, J. None of the counts in the declaration are in deceit; they are all in *assumpsit*. It was, therefore, unnecessary to aver a *scienter*. As to the bill of exceptions, the bill of sale, if not proved to have been made by mistake, or to be fraudulent, is conclusive as to the right of property, and the circumstances accompanying the sale. The warranty of title expressed, is an exclusion of all other warranties not expressed, and conclusive that the defendants did not warrant the qualities or soundness of the slave. The parol evidence going to prove that Wren and Glover both sold the slave, was apt to mislead the jury, and inadmissible in this action. If the declaration had been in deceit, it would have been proper evidence, because the deceit being in the nature of a tort, Wren would have been as liable therefor as Glover, though the property of the slave was in Glover only. It is the unanimous opinion of the court that the judgment be reversed.

SAFFORD, J., not sitting.

ROGERS v. WILSON.

[MINOR, 407.]

IN AN ACTION FOR FALSE IMPRISONMENT under the pleas of not guilty and justification, the whole of the declarations or admissions at the time of the arrest are admissible in evidence, and must all be received, or the whole must be rejected.

A DEPOSITION IS ADMISSIBLE though notice of taking it be not proved, if it appear that the opposite party was present and cross-examined.

REASON TO SUSPECT that plaintiff was guilty may be proved in mitigation of the damages.

EVIDENCE OF PLAINTIFF'S BAD CHARACTER adduced on the cross-examination before the committing magistrate may be used by the defendant in the action for false imprisonment.

ACTION for an assault and false imprisonment brought by Wilson against Rogers. Pleas, not guilty and justification. Verdict and judgment for the plaintiff. Plaintiff offered a witness who testified concerning declarations made by the defendant at the time the plaintiff was being handcuffed by the constable. The defendant then asked the witness whether defendant at the same time did not state that plaintiff was held in custody by virtue of a warrant. This question being objected to, was ruled out. The defendant then offered the deposition of the arresting constable, setting forth facts appearing on the examination before the committing magistrate,

which strongly tended to establish that Rogers had harbored a runaway slave of Wilson's, and also recited testimony of Roger's bad character adduced in answer to a question he had asked himself. There was no proof of notice of the taking the deposition, but it appeared that the opposite party was present and cross-examined. The court rejected the deposition as inadmissible on the issues joined.

Crawford and Hitchcock, for the plaintiff in error.

H. G. Perry, *contra*.

CRENSHAW, J. No rule of evidence is better established than that the whole of the admissions or declarations of a party made at the same time must be received, or the whole must be rejected. On resorting to such evidence, we depart from the ordinary rules of testimony, and such statements are to be cautiously received. If the plaintiff will open the doors to such evidence, it is surely competent for the defendant to avail himself of any statement which he made at the same time and about the same matter.

But it is contended that the statement of the defendant as to putting on the handcuffs ought to have been received as part of the *res gesta*; but that what he said in his own favor going to qualify the act is extraneous matter, and ought to be rejected. The rule is the same whether the statement is taken as a naked admission, or is made at the time of doing the act, and to be considered as connected with it. As a part of the *res gesta* the whole of the defendant's statement should have been received; for it qualifies the act, and shows the object and intention of the party doing it. I am therefore of opinion that there was error in not permitting the question to be answered.

As to the deposition of Davis, the plaintiff was present and cross-examined, and this, I conceive, cured the previous irregularity, if any. The deposition was rejected as being irrelevant to the issues. I am of opinion that all of the deposition which relates to the warrant and to the proceedings of the defendant and the witness under it, although not full and conclusive evidence without the production of the warrant, was good evidence under the plea of justification, and should have been left to the jury.

That part of the deposition which goes to show that Rogers had reasonable grounds to suspect that Wilson had forged a pass for his runaway slave, or that he harbored the slave, was clearly good evidence in mitigation of damages. It was not

full and conclusive evidence of these facts, but it raises a strong presumption of guilt, and should have been left to the jury.

I am not prepared to say, nor is it necessary now to decide, whether the bad character of the plaintiff may be given in evidence in this action in mitigation of damages. But from the analogy to an action for malicious prosecution, or for a malicious arrest, I presume that the character of the plaintiff, so far as relates to the offense which induced the imprisonment, might be given in evidence; and I am satisfied that when the plaintiff himself introduces evidence of his character, to the introduction of which no objection is made by the defendant, that then the defendant may insist on the bad character of the plaintiff in mitigation of damages.

For these reasons I am of opinion that the judgment should be reversed and the cause remanded. A majority of the court have arrived at the same conclusion, but by a different process of reasoning.

LIPSCOMB, C. J., and GAYLE, J., concurred in the result.

TAYLOR and WHITE, JJ., dissented.

CASES
IN THE
COURT OF CHANCERY
OF
DELAWARE.

DALE v. SMITH.

[1 DELAWARE CH. 1.]

PAROL EVIDENCE OF THE INTENTION of the parties is inadmissible to vary a writing in the absence of surprise, mistake, or fraud.

"MORE OR LESS" IN DEED.—Where a written agreement for the sale of a tract of land, described the same as "containing by deed two hundred acres, be the same more or less," and it appeared from a subsequent survey that the tract contained three hundred and fifteen acres, it was held that parol evidence was inadmissible to prove that the parties intended a sale of a less quantity than the entire tract.

NATURAL BOUNDARIES referred to in a deed are to be followed, although by so doing a greater number of acres than that mentioned may be included.

BILL for an injunction and for specific performance. The facts were: Dale entered into written articles of agreement with Smith and Terrapin, defendants, by which he agreed to convey to them for the consideration of seven thousand dollars "a tract of land situated in Appoquinimink Hundred, containing by deed two hundred acres, be the same more or less." It was further agreed that the present year's rent should belong to Dale, "who promises to give the said Terrapin and Smith immediate possession and use of the woodland generally, and of all the wood now cut and corded in the woods, and quiet and peaceable possession of the buildings and premises," six months after the date of the articles. The deed referred to was from Drinker and wife to Colgate, complainant's grandmother, dated seventh September, 1771.

Some time after the date of the articles, a survey was made by complainant, in the presence of one or the other of the de-

defendants, whereby it was discovered that the tract contained three hundred and fourteen acres. Complainant claimed the right to reserve the excess of one hundred and fourteen acres, and tendered a deed accordingly, which defendants refused to accept, demanding a deed for the whole tract. The defendants having entered into possession under the articles, proceeded to cut off the wood from the woodland, which embraced mainly the one hundred and fourteen acres in excess. The bill was to compel defendants to accept the deed and to restrain them from cutting down the trees. The defendants in their answer stated that the purchase was for the whole tract, and denied any understanding that allowance should be made for any surplus. Testimony was offered on both sides as to the understanding of the parties of the terms of the agreement.

Read, Rodney and Van Dyke, for the complainant.

Rogers and Broom, contra.

RIDGELY, Chancellor. The articles of agreement, signed by the complainant on the twenty-sixth of September, together with the deed referred to, furnish the only guide by which the real contract of the parties can be ascertained. The intention of the parties must be sought there. The complainant's counsel rightly observed, that this is a question of intention and construction, but then the intention must be discovered from the construction of the articles. And further, the deed of Drinker and wife to Colgate, of the seventh of September, 1771, became part of the agreement, and the extent of the agreement must be ascertained by that deed. No circumstance has appeared by which it becomes necessary to resort to parol evidence. There is no surprise, no mistake, no fraud. Every act of the complainant was done with his eyes open, and with sufficient knowledge of the quantity of land, and without the least practice on the part of the defendants to draw him into any new or different agreement.

It is unnecessary to run through all the cases which this subject affords. They generally turn upon particular circumstances. Fraud will vitiate a deed, and parol proof may be given of the fraud, but then the party obtaining the deed must be guilty of the fraud. And unless there be some *suppressio veri* or *suggestio falsi*, some circumvention, the deed must stand on its own ground. Here there is no such thing, and moreover, the complainant was perfectly informed of every fact necessary in disposing of this land. Fraud is what is done in secret, and

where there is a concealment from the party in a matter which concerns his interest: 2 Atk. 559, 561. In 2 Atk. 383-4, Lord Hardwicke says, "to add anything to an agreement in writing, by admitting parol evidence which would affect land, is not only contrary to the statute of frauds and perjuries, but to the rule of the common law before that statute was in being.

The reasoning of Lord Thurlow, in the case of *Lord Irnham v. Child*, 1 Bro. Ch. 92, is peculiarly applicable. That was a grant of an annuity. On settling the terms, it was agreed that the annuity should be redeemable, but the parties, supposing that this appearing on the face of the transaction would make it usurious, agreed that the grant from Lord Irnham to Child should not have in it a clause of redemption, and so it was drawn and executed. Upon a bill filed to redeem, alleging that such was the agreement, parol evidence was read, but the lord chancellor would not relieve. He said the rule is perfectly clear, "that where there is a deed in writing, it will admit of no contract which is not part of the deed. Whether it adds to, or deducts from the contract, it is impossible to introduce it on parol evidence." Again, he says "if the agreement had been varied by fraud, the evidence would be inadmissible. The argument must then be to impute fraud to the party. The rule of evidence is not subverted if there is clear proof of fraud. The committing of the agreement to writing is an argument against fraud. Then as to mistake or accident, suppose it was a very clear thing that one agreement was intended, and that by accident it was extended farther. But there is no such case in the books. If admitted to be a mistake, the court would not overturn the rule of equity by varying the deed, but it would be an equity *dehors* the deed. Then it should be proved as much to the satisfaction of the court as if it were admitted. The difficulty of this is so great that there is no instance of its prevailing against a party insisting that there was no mistake."

In *Hare v. Shearwood*, 1 Ves. jun. 241, where it was attempted to prove an agreement made on the purchase of an annuity that it should be redeemable, Mr. Justice Buller, sitting for the lord chancellor, said, that the case was an attempt to carry the rule of evidence in that court further than had ever been done, and that it was not supported by any precedent or authority; that it was not one of the excepted cases, which are cases of fraud, and where the party will admit there was some agreement. In *Portmore v. Morris*, 2 Bro. Ch. 219, Lord Kenyon, then master of the rolls, in a like case, to prove by parol

evidence that an annuity was redeemable, said, "before the statute of frauds, parol evidence could not be admitted to contradict written agreements, except in very particular cases indeed, and afterwards deeds were under the same rule. If fraud was imputed, it might be done here; but it is dangerous to depart from the deeds. It might be the intention that the annuity should be redeemable, but I can only get at it by demolishing one of the foremost rules of law; therefore I reject the evidence."

The case of *Brodie v. St. Paul*, 1 Ves. jun. 326, is very strong. There there was a treaty between the parties about letting a farm. The defendant read from a paper certain items as the terms of their agreement, and an agreement was drawn up with reference to that paper; and that agreement, signed by both parties, was deposited in the hands of a third person. They were to meet again to complete the business. They met, but differed about the clauses read from the paper. A bill was filed for a specific performance of the agreement signed, according to such clauses as had been read from the paper. Parol proof was given. Buller, J., sitting for the lord chancellor, said there was a wide difference between referring generally to a paper, and referring to such part as was read: "For where the reference is general, the paper, if sufficiently described, speaks for itself; but here the whole is to depend upon parol:" p. 333. And again, he said, "the question here is, what is the agreement? The whole depends upon parol. If the agreement is certain and explained in writing signed by the parties, that binds them; if not, and evidence is necessary to prove what the terms were, to admit it would effectually break in upon the statute, and introduce all the mischief, inconvenience and uncertainty the statute was designed to prevent. The only thing to support this case would be to prove by parol evidence which of these covenants were read and which were not. That is directly prohibited by the statute, and therefore the bill must be dismissed." The last case which I shall cite is *Rich v. Jackson*, 4 Bro. Ch. 514. Stiles and Jackson were in treaty about a lease. It was mentioned by Stiles and Jackson, in the presence of witnesses, that Stiles was to receive eighty guineas a year for the premises, clear of all taxes. Jackson drew up the memorandum in his own handwriting; the agreement to pay the taxes, or that the rent should be clear of all taxes, was omitted; this memorandum was signed by Stiles and Jackson. Lord Chancellor Loughborough said that, "believing the wit-

nesses, it was impossible to mistake the meaning of the parties that the rent to be paid was meant to be a clear rent, but the parties had concluded the matter by a written agreement, which was that a lease should be granted for twenty-one years, and eighty guineas a year, and the tenant paying his twenty guineas a quarter, including in it his land-tax receipt. It can only be according to the sense the law puts upon it."

Again, he says: "I have looked into all the cases. I cannot find that the court has ever taken upon itself to add to the form of the agreement; but in repeated instances the court has refused to do so, though it has been insisted that the parol evidence of the adverse party has shown the written agreement to be against conscience." And further he adds: "It is quite impossible to admit the rule of law to be broken in upon, and that requires that nothing should be added to the written agreement, unless in cases where there is a clear, subsequent, and independent agreement varying the former, but not where it is of matter passing at the same time with the written agreement."

Now, if we take these decisions as forming a rule by which the case under consideration should be determined, it is plain that the parol evidence read in this cause ought not to control nor in any degree influence me in the construction of the articles of agreement made the twenty-sixth of September, 1812. In the articles, the complainant binds himself to convey a tract of land containing by deed two hundred acres, be the same more or less. The deed here referred to became a part of the contract, and the party is confined to the boundaries in that deed; that is, to grant to the defendants to the same extent that Henry Drinker granted to Elizabeth Colgate. According to that deed, an old corner maple, standing by the side of the branch, is the place of beginning; from thence, the first line was north two hundred and thirty perches to an old corner gum standing in a pocoson. To give the proper effect to this distance of this line, it must extend to that gum. That is a natural boundary in which there can be no mistake; and so the second line must extend to the white oak, and the third to the live oak, and thence to the first mentioned corner maple. If the first line stops at the end of two hundred and thirty perches, the gum, the white oak and the live oak are thrown out of the description of the land, and are made to mean nothing. And this would be directly contrary to the written agreement. According to this article, and to the deed referred

to, we must go to the natural boundaries. This is the construction which has ever been given to papers describing or calling for natural boundaries, and it accords with justice and sound sense. Besides, the complainant, by the article, agreed to give defendants immediate possession, and use of the woodland generally, and of all the wood cut and corded in the woods. By the "woodland generally," I understand all the woodland, and this construction is confirmed by the agreement to give up also all the wood then cut and corded in the woods. Wood had been cut promiscuously on the land, as well on that part which the complainant says he intended to sell, as on that part which Smith and Terrapin contended they also purchased. As the complainant agreed to give up, not only the wood cut, but the woodland generally, without any limitation, I am at a loss to perceive how the defendants can be restrained to any particular spot. Their right equally extends over the whole, according to the description of the deed, and according to this agreement to give them the immediate possession and use of the woodland generally, and of the cut and corded wood. Viewing this case in all its parts and upon all the evidence, I can put no other construction on the transaction.

It appears that a survey was made after the contract had been executed, but such survey was not a clear, subsequent, independent agreement, varying the former. Although Smith acquiesced in its being made, yet he never agreed, nor intended that it should supersede the boundaries limited and fixed in the deed of Drinker and wife. No agreement was made at the time of the survey. The articles of the twenty-sixth September, were not dispensed with nor annulled. The survey seems to have been an experiment made by Dale on his part, probably with the intention of fixing the agreement of the twelfth September to the neat distances called for in the deed, but not thereby to make a new, independent agreement. Neither did Smith, who was present, intend any alteration. This is not pretended. Indeed, the survey is said, in argument, to have been made in execution of the agreement. The written agreement must then be resorted to as the only clear, satisfactory legal evidence of the contract made by the parties.

Let the injunction be dissolved and the bill dismissed.

On appeal, this decree of the chancellor was affirmed by the high court of errors and appeals at June term, 1817.

THE WORDS MORE OR LESS IN A DEED are construed to mean that the parties are to run the risk of gain or loss in the estimated quantity: *McCorm v. Delany*, 6 Am. Dec. 635. "The terms 'more or less' neither limit nor extend the grant, but are generally used in the absence of definite knowledge of the boundaries and extent of the land intended to be conveyed, to exclude a construction that the quantity named in the conveyance should be conclusive upon the parties:" *Cutts v. King*, 5 Me. 482; *Blaney v. Rice*, 20 Pick. 62; per Howard, J., in *Pierce v. Faunce*, 37 Me. 67. On the contrary, if from the whole instrument and the conduct of the parties, it appears that the intention was to sell by the acre, and not by the tract, the insertion of the words "more or less" will not prevent a recovery for the deficiency: *Wilson v. Randall*, 67 N. Y. 338; *Triplett v. Allen*, 26 Gratt. 442.

THAT BOUNDARIES IN A DEED are to control in ascertaining the land conveyed, see *Bradford v. Hill*, 1 Am. Dec. 546; *Howe v. Bass*, 3 Id. 59; *Higuera v. United States*, 5 Wall. 836; 3 Wash. on Real Prop. 350. And a statement of the quantity of land supposed to be conveyed, when inserted by way of description only, must yield to descriptions by monuments, and metes and bounds: *Pierce v. Faunce*, 37 Me. 63; *Chandler v. McCord*, 38 Id. 564; *Marshall v. Bompart*, 18 Mo. 84; *Whiting v. Dewey*, 15 Pick. 428; *Dalton v. Rust*, 22 Tex. 133; *Sanders v. Godding*, 45 Iowa, 463.

PAROL EVIDENCE OF BOUNDARIES AND LOCATIONS is admissible to explain ambiguous terms: 2 Whart. on Ev. 942; *Dunham v. Gannett*, 124 Mass. 151; *Blackman v. Doughty*, 10 Vroom, 402; *Bybee v. Hageman*, 66 Ill. 519; *Maguire v. Baker*, 57 Ga. 109; *Leroy v. Duckworth*, 13 La. An. 410; *Colton v. Seavey*, 22 Cal. 497.

RODNEY v. SHANKLAND.

[1 DELAWARE CH. 35.]

THE PERSON FOR WHOSE BENEFIT a trust is created may compel the performance thereof, in equity, although he may be no party to the contract. Accordingly, where the first of several judgment-creditors entered into a written agreement with those subsequent to the second, that if they would allow the first to purchase at sheriff's sale a certain portion of the judgment-debtor's realty, without let or hindrance, he would discharge the remainder of the realty from his judgment and would pay the second judgment-creditor, it was held that the latter although no party to the agreement could enforce the contract in equity.

BILL to enforce a trust. The facts were: Several judgments having been recovered against John Little and his executor Nicholas Little, in favor of Henry Neill, Luke Shields, Fisher and Warder, respectively, pending the executions issued under the first two judgments, an agreement in writing was entered into between Neill, Fisher and Warder, by which Neill, in consideration that Fisher and Warder would permit him to purchase upon the sheriff's sale under his execution, a certain tract of land without any let or hindrance on their part, promised to release the residue of the premises from his execution

which had been levied thereon, and to pay or cause to be paid to Luke Shields the amount of the judgment obtained by him against Little. This agreement bore date February 10, 1787. In pursuance thereof Neill bought in the five hundred acre tract without any let or hindrance from the other parties to the agreement, received the deed therefor, and gave to the sheriff, P. F. Wright, his acknowledgment of indebtedness for the small difference between the amount of Neill's judgment and the amount bid.

Subsequently in 1792, Rodney and another, the administrators of Luke Shields, brought their action against the executors of the sheriff, Wright, to recover the amount of Shields' judgment against Little. Pending the action, an agreement in writing was entered into between the parties to that action and Henry Neill, to refer the matter to arbitrators to ascertain the amount of the debt. In this instrument it was recited that Neill "became by agreement with certain judgment-creditors of Little, and with the then sheriff, by a note of hand, etc., liable for the said plaintiff's (Shields') share of the money arising upon the said sales of the said land." It appeared that Wright, thinking that Neill was liable under the agreement of 1787, to pay to Shields the full amount of his judgment, had paid over the proceeds of the sale to Neill, to Fisher and War-der. When the administrators of Shields learned of the instrument of 1787, of which they knew nothing at the time they instituted their action against the sheriff's representatives, they abandoned that action and commenced the present suit in equity against Shankland, the executor of Neill, against the sheriff's administrators, and against the administrator of one Fisher, to whom it was alleged payments had been made by Neill, while Fisher was acting as Shields' executor.

The answer of Neill's executor, besides relying on the fact that Shields was not a party to the agreement, also alleged that it was understood that he should apply the balance only of the purchase-money remaining after satisfying his own judgment to the discharge of Shields' judgment, it being then thought that the land would sell for a sum sufficient to pay both judgments.

Robinson, for the complainant.

Wells, for Neill's executor.

RODNEY, Chancellor [after construing the agreement to mean that Neill was to pay the whole of Shields' debt]: The

defendant, Shankland, contends that the administrator of Shields, and that Wright, the sheriff, were not parties to the agreement of tenth of February, 1787; and therefore, that there is no privity between the complainant and the defendant; and consequently, that the complainant cannot prosecute this suit on the said agreement against Neill's representative; that if the complainant had any cause of action, it was against Wright, the sheriff, and his executors, for the money levied under the *venditioni exponas*, upon which the land was sold; and that his remedy was at law, both according to the rules of the common law, and the provisions of the act of general assembly, entitled "An act for establishing courts of law and equity within this government."

That Shields' representatives had a remedy at law against the sheriff for the balance of the sales of the land of John Little, after the payment of Neill's judgment, is too plain a proposition to be denied. Neill had recovered the first judgment, Shields' administrators the second; and consequently, after the payment of Neill, the whole real estate of John Little was bound for this judgment of Shields' administrators. And at law the sheriff was liable for having applied any part of the purchase-money arising from Little's real estate to the Messrs. Fisher or to Warder, in preference to Shields' administrators; but it would be monstrous in a court of equity to allow Neill to make such a defense in violation of his agreement of February, 1787; and that, too, after he has received the full benefit of that agreement. What would be the consequence? It would be this: Shields' administrators must sue the sheriff; the sheriff must sue the Messrs. Fisher; and they must enforce at law the agreement of 1787 against Neill. Thus, a circuitry of action must be produced, and justice could not be done. Such a course would be manifestly unjust; because, as nothing could be recovered at law, more than the nominal sums given for the several parcels of the land, the full amount of Shields' judgment, which Neill agreed to pay, and which was part of the consideration for the five hundred acres of land, would be fraudulently withheld by Neill. He would thus take advantage of his own wrong; and that, too, after he had agreed to be purchaser, and had substituted himself as paymaster for the full amount, instead of the sheriff, to Shields' administrators. Now, the true question is, whether Shields' administrators, not being parties to the agreement of 1787, can compel Neill, or his representative, to execute that

agreement. At law, it is certain that they cannot, because they were not parties to the contract; and if equity will not afford a remedy, their case is hopeless.

In speaking of privity, it may be necessary to take a very slight view of uses at common law, as connected with this subject. To the execution of a use, two things were absolutely necessary: confidence in the person, and privity of estate. All who came in, in privity of estate, or with notice, or without consideration, are bound by it. And in 1 Co. 122, b, it is said that although a stranger purchased land from a feoffee to uses for a valuable consideration, yet if he had notice of the former uses, he would be compelled to execute them. According to 2 Com. Dig., Title Chancery, 627 (4, c), Title Notice (4, C. 1), notice of a trust makes a person privy; as, a person with notice of a trust, judgment, mortgage, or other incumbrance, shall be affected by it: sec. 1, Eq. Cas. Ab. 332; 2 Com. Dig. 627, 717.

Now it is evident that Neill had complete notice of this judgment of Shields' administrators; that he engaged to pay it; that that he purchased the land subject to this judgment; and that the advantage or convenience which he derived from being allowed to purchase as he did was a sufficient consideration in equity. The question then occurs, whether Shields' administrators have any remedy in equity. The counsel for the complainant cited the case of *Dutton v. Dutton*, 2 Eq. Cas. Ab. 739, p. 4. There D., having more than three thousand pounds per annum, married M., the plaintiff, who had ten thousand pounds portion, and settled one thousand pounds per annum upon her for her jointure; and the greatest part of D.'s estate was settled upon the first and every other son in tail-male successively, as is usual in marriage settlements. D. ran greatly in debt, and J., his eldest son, being of full age, D., on calculating his debts and estate, agreed with J. to convey all his estate to him, and J. covenanted to pay all D.'s debts and allow him five hundred pounds per annum as a rent charge for his life; and further (upon which the question arose), that J. should indemnify D. from all his debts, and from the charges and expenses for the maintenance of the said M., she being then separated by consent. M. brought a bill against D. and J. to have an allowance for her maintenance, etc.; Lord Chancellor Cowper ordered M. to be allowed two hundred pounds per annum. He said that by this covenant to indemnify D. from maintaining M., his wife, J. had taken upon himself the charge of maintaining her, and, as to this purpose, stands in D.'s place, who is bound to give

his wife an allowance, if he voluntarily separates from her; and he said that he took J. in this case to be in the nature of a trustee for the wife, so far as a reasonable allowance for her maintenance was concerned.

It is not easy to distinguish in principle the difference between the right of the wife in this case of *Dutton v. Dutton*, and the right of Shields' administrators to sue in equity. In both cases the covenantors made an agreement for the benefit of a person not a party to the covenant, and as they both received a sufficient consideration, it is quite as reasonable that Neill should be considered in the nature of a trustee for Shields' administrators, so far as to pay the judgment, as that J. should be a trustee for the maintenance of the wife. The counsel for the complainant cited also *Lechmere v. Carlisle*, 3 P. Wms. 211, to this effect that every *cestui que trust*, whether a volunteer or not, or be the limitation under which he claims with or without a consideration, is entitled to the aid of a court of equity to avail himself of the benefit of a trust, and that the forbearance of the trustees shall not prejudice him. In these cases the principle seems to be fully established, that the person for whose benefit a trust is created may compel the performance, although he may be no party to the contract. It is to be observed that Shields' administrators were not mere volunteers. They had a lien prior to Neill's engagement on the land of John Little, which Neill, for his own accommodation, agreed to satisfy. I might refer to cases of marriage settlements: *Osgood v. Strobe*, 2 P. Wms. 245; *Vernon v. Vernon*, 2 Id. 594; *Goring v. Nash*, 3 Atk. 186; where persons, not parties to the articles, and from whom no consideration flowed, were permitted to enforce their specific execution. It is true, the principles of these cases do not strictly apply to this, but they prove that equity will not compel a person to sue upon a covenant, in the name of trustees, when circuity of action may be prevented, and when equity can afford a more adequate remedy to the person for whose benefit the covenant was made, by his suing in his own name; and it is not an objection that the party claiming under a covenant is a volunteer, and that the consideration did not move from him, if the party making the articles had a sufficient consideration. In the supreme court of the United States, *Riddle & Co. v. Mandeville and Jameson*, 5 Cranch, 322, it was decided that equity will decree the payment to be immediately made by the person ultimately responsible to the person who is actually entitled to receive the

money. That was a suit brought in equity by the holder of a promissory note to recover its amount against a remote indorser. In a suit between the same parties, that court had previously determined that the plaintiff was without remedy at law. Although there were some particular circumstances in that case, yet the court, in the opinion delivered by Chief Justice Marshall, laid down the law broadly, that equity will make that party immediately liable who is ultimately liable at law. There, as well as in this case, the plaintiff had no remedy at law.

This doctrine is confirmed in a subsequent case in the same court: *Russel v. Clark*, 7 Cranch. 69, as well as the doctrine that notice of a trust makes the person having such notice a trustee. The latter point is first mentioned by the court thus: "It also appears, that in September, 1796, Robert Murray & Co. assigned to Loomis and Tillinghurst, certain personalities in trust. This assignment was surrendered to Clark, the plaintiff, and Nightingale, his deceased partner, in consideration of notes to a large amount, in which Loomis and Tillinghurst were bound for Robert Murray & Co. It appears that Clark and Nightingale are otherwise secured with respect to these notes. At least, there is reason to believe that they are secure. Clark and Nightingale having taken this assignment, with notice of the trust, take it clothed with the trust. They are trustees for the same uses, and to the same extent with Loomis and Tillinghurst. A paper appears in the cause which purports to be the assignment to Loomis and Tillinghurst. The assignment is in trust: 1. To repay themselves any sums which they may pay on account of certain undertakings made by them for Robert Murray & Co.; and, 2. In trust to pay to Joseph and William Russell all such moneys as they shall be liable to pay, as guaranty as aforesaid, to Nathaniel Russell upon bills, etc., reciting the bills for which this suit is instituted. It is settled in this court, that the person for whose benefit a trust is created, who is to be the ultimate receiver of the money, may sustain a suit in equity to have it paid directly to himself. This trust being to pay Joseph and William Russell a sum which they are liable to pay to Nathaniel Russell, and being created in such terms that the money is certainly payable to them, the purposes of equity will be best effected by decreeing it, in a case like the present, to be paid directly to Nathaniel Russell. Indeed, the court ought not to decree a payment to Joseph and William Russell without security that the debt to Nathaniel Russell shall be satisfied."

This case pointedly supports the complainant in sustaining his suit to recover money directly to himself, of which he was to be the ultimate receiver. And it may be remarked that the plaintiff, Nathaniel Russell, was not a party to the assignment made to Loomis and Tillinghurst, neither was it a trust to pay immediately to him any money, but only "to pay to Joseph and William Russell all such moneys as they shall be liable to pay as guaranty as aforesaid to Nathaniel Russell, the complainant, upon bills." There the trust was for the indemnity of Joseph and William Russell on account of such moneys as they shall be liable to pay to Nathaniel Russell. But as the trust was ultimately for the benefit of Nathaniel Russell, although he was no direct party to the assignment, or deed of trust, it was the opinion of the court that the purposes of equity would be best effected by decreeing a payment of the money directly to him. In the case before us, Neill promises to make a direct payment to Shields' administrators, and on this agreement, I have no hesitation, upon the above authorities, and upon the reason and justice of the demand, to decree payment to Shields' administrators.

That a third person may recover on a contract made in his behalf: See *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 304 and note, and *Arnold v. Lyman*, 9 Id. 154 and note, in both of which cases it was held that assumpsit would lie in favor of a third person against one who for a valuable consideration has made a promise for the benefit of such person.

VAN DYKE v. JOHNS.

[1 DELAWARE CH., 93.]

AN EXPRESS TRUST DOES NOT ARISE in favor of the heirs at law, and against the administrator who purchases through a third person lands sold under an order of the probate court, where there is no proof of any declaration of trust between the parties, nor of any declaration in writing under the statute of frauds.

NOR DOES A TRUST BY LEGAL IMPLICATION exist in such case, there being no consideration to raise the use upon the legal estate created by the deed of bargain and sale.

A TRUSTEE'S SALE TO HIMSELF is, as a general rule, void; but it is not universally true that such a sale is void at all times and under all circumstances.

IF A CESTUI QUE TRUST ACQUIRES for a long time in an improper purchase by a trustee, equity will not assist him to set aside the sale. So, where the complainants did not file their bill until thirty years after the sale

complained of, and more than twelve years after the arrival at majority of the youngest heir, equity will not relieve.

THE DECREE OF AN ORPHANS' COURT confirming an administrator's sale cannot be impeached collaterally.

BILL seeking to charge the defendant as trustee of certain lands for the complainant's benefit. The defendant, as administrator of the estate of Nicholas Van Dyke, in 1789, pursuant to an order therefor from the probate court, sold certain lands of the deceased for the payment of the debts. The premises were struck off to one Monro, the highest bidder, and the return made and the sale confirmed without objection. The deed was then executed to Monro, who re-conveyed the premises to the defendant on the day following. The administrator Johns, in his administration account, charged himself with the amount paid on the sale—one thousand six hundred and seventeen pounds. The complainants were the children and heirs at law of Nicholas, all of whom joined in the suit except the eldest son, and a daughter Ann, the defendant's wife. The bill filed in 1817 charged that Monro bid at the sale on behalf and at the request of the defendant, claimed that the defendant, while administrator, could not deal with the trust estate in his individual capacity, alleged that defendant had said that he purchased the land from Monro for the benefit of the heirs of his intestate, and prayed that he be decreed to hold the lands in trust for the complainants, that he account for the rents and profits, and for general relief.

The defendant's answer averred that the purchase was made in good faith by the defendant for his own benefit; that there was no fraud in the sale, there being much competition, and the lands being struck off for their full value; that the widow and heirs had recognized his title by sundry acts; that they had slept on their title, if they had any, for many years, and allowed defendant to expend large sums in improvements; that there was a remedy at law, and that the action was barred by the statute. Issue joined and testimony taken.

Read, Sr., McLane, and Read, Jr., for the complainants.

Black, Rodney, H. M. Ridgely and T. Clayton, contra.

RIDGELY, Chancellor. Upon two grounds it is insisted that the defendant is a trustee for the complainants of the real estate held by him under the deed from George Monro, who was the purchaser at the sale made by the defendant as administrator of Nicholas Van Dyke, deceased, viz: 1. That there is an

express trust; and, 2. That a trust arises by implication of law.

1. As to the express trust. That, it is supposed, is made out by the testimony of George Monro. This witness, after describing the lands and stating the time and place of the sale and attendance of other persons, says that he does not know whether those who attended the sale thought that the real estate was to be bought in for the widow and children, for that he mixed very little with the people; that he knew his own object in attending the sale and had little or no communication with others. He went there at the request of the defendant and with the impression that he was to buy the real estate for the widow and children of Nicholas Van Dyke, and if he had not had such an impression he never would have attended the sale. He had a great regard for all the family and for the said Nicholas Van Dyke, and highly respected his memory. It was for this cause that he attended the sale and wished to buy the real estate for the benefit of said Nicholas Van Dyke's widow and orphan children. He further says, that he does not know whether the defendant represented that it was either his object, or wish, or intention, to secure the said real estate for the widow and children, nor does this witness know whether the said defendant made any representation or explanation. All that he, the witness, knows in this respect is, that he had an impression on his own mind that he was to buy in the real estate for the widow and children, so that the property might not be sacrificed, but be used to the best advantage for the benefit of the widow and children. The witness does not recollect the sum he bid for the said land, but states that he did not purchase for himself; that he purchased for the defendant, for the use and benefit of the widow and children, and that the defendant did request the witness to bid for him. The witness cannot remember the reasons which the defendant assigned for this request, nor whether he assigned any, but he considered, from the connection of the defendant with the family of Nicholas Van Dyke, and also from the confidence which the witness placed in his intentions, that the defendant wished him, the witness, to attend the sale for the purpose of buying in the property for the widow and children. From the assurances which the defendant gave the witness that he could incur no risk or difficulty, and that the said real estate should not remain on his hands, but that the defendant would take it off his hands and secure him, the witness bid off the land, as he then thought,

for the widow and children. He further says, that he never paid any consideration for the said real estate.

The sale of this real estate to George Monro was made on the third of October, 1789. The return was made the sixth October, 1789. Kensey Johns' deed to George Monro, is dated the twelfth October, 1789, and George Monro's deed to Mr. Johns, the thirteenth October, the next day. In an administration account passed by Kensey Johns on the sixth April, 1790, he accounted for one thousand six hundred and seventeen pounds, the amount of the sums bid by George Monro. It appears that the proceeds of the real estate fell far short of paying the debt of the decedent. None of the other witnesses have any knowledge that the purchase was made for the benefit of the widow and children of Nicholas Van Dyke. Mr. Stockton rather contradicts that idea. Mr. Pearce had no communication with the defendant on the subject, but he understood, among the people collected at the sale, that the property was purchased for the family, and that on that account no person would bid. This is the evidence upon which the express trust is supported. If this evidence is sufficient, it will be manifest that this trust will grow out of the impressions of the witness, and not from any express declarations of the defendant. George Monro attended the sale with the impression that he was to purchase for the benefit of the widow and children, and he repeats the convictions of his own mind more than once in the course of his testimony, but he declares that he does not know whether the defendant represented that it was his object, or wish, or intention to secure the land for the widow and children, nor does he know whether he, the defendant, made any representation or explanation. He does not remember whether Mr. Johns assigned any reasons for desiring him to attend the sale and purchase the land, but he considered, from the connection of the defendant with the family of Nicholas Van Dyke, and also from the confidence which the witness placed in his intentions, that Mr. Johns wished him to attend the sale for the purpose of buying in the property for the widow and children. In the whole of this transaction there is no evidence of any declaration of Mr. Johns. No terms, no conditions, no consideration, no limitation, nor use of the land is talked of or agreed upon, by either Mr. Johns or George Monro; and yet it is expected that the impression of the witness should be sufficient to amount to a declaration of trust. George Monro explains how it happened that these impressions were made on

his mind. He considered, from the connection of Mr. Johns with the Van Dyke family, and from the confidence which he placed in the intentions of Mr. Johns, that he was to purchase in the land for the widow and children.

Neither George Monro, nor the complainants, nor any one of Nicholas Van Dyke's family, ever paid any consideration for this land. The consideration or purchase-money was accounted for by Mr. Johns in his administration account passed the sixth of April, 1790. Then, no valuable or meritorious consideration ever passed from George Monro or from any of the complainants; neither was any declaration made by parol or in writing at the time of the sale, nor when the deeds of conveyance were executed, nor at any other time, of any use of this land for the complainants.

An express use is where the use or interest is openly declared and expressed between the parties, upon the creation of the estate whereunto the use is annexed: Sheppard's Touchstone, 501. But, instead of any declaration or expression made between the parties of the use here claimed, we have merely the impressions of George Monro, without his knowing that Mr. Johns had any object, or wish, or intention to secure the land for the complainants, or even whether he made any representation or explanation in relation to this matter. To declare this to be an express trust for the complainants would be to make the defendant a trustee upon the mere opinion or impression of George Monro, without any proof in relation to the defendant. The whole contract would be on one side, and the defendant's mind or intention would not be known. Uses, it is said, may be created by word or parol agreement, as well as by deed or writing; as, if a man, by verbal agreement, in consideration of money or the like, sell his land to another. or agree and promise that the bargainee shall have it for any time, although no use or estate will thereby arise, if it be a freehold that is sold, within the statute, 27 H. 8, c. 16, because it is not by deed indented; yet a good use will arise at common law, and the bargainee shall have relief in equity for his purchase: Shep. Touch. 508. But it is because the consideration, in equity, raises the use: 1 Bac. Abr. Bargain and Sale, C. 468.

Since the statute of 29 Cor. 2, c. 3, all declarations of trust, except such as arise by implication of law, must be in writing, and signed by the party who is in law enabled to declare such trust, or else it must be by his last will in writing. If the English statute extends to this state, then there could be no

express trust, because there is no such declaration in writing. However, without determining that matter, I think that the complainants have failed in establishing any express trust, even by parol; for, whatever George Monro's intentions were, it was evident that he considered himself altogether as the agent of Mr. Johns in purchasing in or bidding off the land, and that he was to give no direction to the limitation or disposition of the land. He paid no consideration; he incurred no risk or difficulty; he was a mere instrument in passing the estate and conveying the legal title in the land. He made no terms; and, in short, it was evident from his testimony that no contract was ever made, or trust declared by, or between him and Mr. Johns for the use or benefit of the complainants.

Second. As to a trust by legal implication. In all cases of uses and trusts which are not within the statute of uses, 27 H. 8, c. 10, the law is now as it was before the statute was made, and all those matters are determinable in chancery: 7 Bac. Abr. Uses and Trusts, 135; Shep. Touch. 506. In cases where uses pass by transmutation of possession, as by fine, feoffment, or common recovery, then the consideration is not material, for he who makes the estate may appoint the use without any consideration. But, in bargains and sales, and covenants to stands seised to uses, it is otherwise; for there the consideration is so necessary that nothing will pass, neither will any use arise, without a consideration, that is, some matter that may be cause or occasion meritorious, amounting to mutual recompense, in deed or in law, which must be expressed or implied in the deed whereby the use is created, or else supplied by averment and proof: 7 Bac. Abr. Uses and Trusts, 96, 97; 1 Bac. Abr. Bargain and Sale, D. 469; Shep. Touch. 570; *Mildmay's case*, 1 Rep. 175, b. 176, a; 3 Bro. Ch. Rep. 12, 13. And no court of conscience will enforce *donum gratuitum*. In this respect, then, there can be no implied trust, for the complainants never paid any consideration.

But there is another rule in equity relied on by the complainants, that is, that a trustee cannot be a purchaser of the estate of which he is a trustee, and that this is a general rule of public policy depending not upon the circumstances of the case, but upon general principles; that, however honest the circumstances of any individual case may be, the general interests of justice require the purchase to be avoided in every case. But, notwithstanding the extent which is given to this rule in English decisions, it is not there without some limitation. In

Whelpdale v. Cookson, 1 Ves. sen. 9, Lord Hardwicke said that if a majority of the creditors agreed to allow it, that is, a purchase by a trustee made for him by another person, he should not be afraid to make the precedent; and in *Campbell v. Walker*, 5 Ves. jun. 678, the master of the rolls, afterwards Lord Alvanley, said that any trustee purchasing trust property, is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* chooses to say that he is not satisfied with it. In that case it was referred to the master to inquire whether it was for the benefit of the plaintiffs that the premises should be resold. Also, in *Morse v. Royal*, 12 Ves. jun. 335, a purchase made by a trustee was established under circumstances. So that the proposition is not universally true, that at all times and under all circumstances, a sale made by a trustee to himself is void, and the broad rule, which now seems to prevail in England, required years to bring it to its present maturity: See Sugden on Vendors, 391, 394, 399. It is not even here desired that this sale should be declared void, but that the defendant should be decreed to be a trustee for the complainants of the land sold by order of the orphan's court, and that an account should be taken of the rents and profits. According to the general course of the cases in England, where the trustee remains in possession of the land which he has purchased of the *cestui que trust*, and the sale is questioned and disapproved by the court, the sale is declared void; but where the trustee has parted with the land at an advanced price, he is made to account for the difference in value. And when the sale is declared void or the difference in price accounted for, all who are interested in the estate, the *cestui que trust*, heirs, creditors, those entitled to the surplus, if any, all come in according to their respective interests. Nothing can be more equitable, for if the act of the trustee is annulled, all those in interest, no matter in what character or relation they stand to or are connected with the estate, all should and ought to come in and be restored to their original condition and relation to the estate, as near as time and circumstances will allow. The prayer of this bill could never be allowed in its fullest extent, under the most favorable circumstances, to the complainants, because, if this sale should be declared void, then the creditors of Nicholas Van Dyke must in the first place be let in, for they have a superior equity to the complainants, and a better title in law to have that estate applied to their use, and the complainants could be entitled only to the surplus after the payment of the debts. Upon no

principle whatever can the heirs claim any advantage from the transaction in exclusion of the creditors. If the sale was void, then the creditors present themselves as having in law a superior right, and if the sale has been so managed as to make the defendant a trustee, he is a trustee for the creditors as well as for the heirs, so that there can be no implied trust exclusively for these complainants.

But there are other reasons that should have weight in the consideration of this case. First, is the long delay of the complainants. The sale was made in the year 1789, now nearly thirty years ago. Abraham Van Dyke, the youngest child, was more than twelve years above the age of twenty-one when the bill was filed. Sugden, in his treatise on Vendors, 404, remarks that if a *cestui que trust* acquiesce for a long time in an improper purchase by a trustee, equity will not assist him to set aside the sale. He cites *Price v. Byrn*, 5 Ves. jun. 681, where Lord Alvanley refused the aid of the court, because the bill had been delayed twenty-one years. There was no period of time from the first purchase of this land to the present moment that it was not known that the defendant was the purchaser. His deed to George Monro and George Monro's deed to him were quickly recorded. The defendant held the land. The widow during her life, and several of the complainants, on their arriving at age, knew perfectly well the manner in which the title to this land was acquired, and there can be no pretense to say that this material fact was not as well known within one twelve-month after the transaction as at any subsequent period. Second, another objection to the relief sought by this bill arises from the fact that the sale was returned to and confirmed by the orphans' court. But it is said the orphans' court is a court of limited jurisdiction, proceeding under the act of assembly, and 4 Binn. 404; and 6 Id. 490, are cited to show that a decree of the orphan's court may be examined in a collateral suit. It has been so decided in Pennsylvania, but I think not correctly, nor according to the general rules of law. Chief Justice Tilghman, in 4 Binney, says, if the question were open (that is, whether a decree of the orphans' court should stand until it were reversed) I should think it well worthy of consideration; but it has been otherwise settled in Pennsylvania, and in 6 Binney, he says, it might be more convenient and render the law more uniform, if those proceedings in the orphans' court were reversible only on appeal; but after the long practice which has prevailed of inquiring into these pro-

ceedings, in actions of ejectment, it is too late to attempt an alteration. It is evident that Chief Justice Tilghman is not altogether satisfied with the practice in Pennsylvania, and a slight consideration will show the inconvenience and frequent injustice of suffering these proceedings to be inquired into and reversed in every collateral suit. The orphans' court does not exist by the act of assembly. A portion of the judicial power of the state is vested in the orphans' court; with respect to the matters over which it has jurisdiction it is a court of as public and general jurisdiction as the court of chancery, the supreme court, or the court of common pleas. It would be extraordinary that the judgment of a justice of the peace should be unimpeachable until reversed on a writ of certiorari, and that the decree of the orphans' court should stand for nothing, or rather be liable to be impeached, reversed and annulled, before all and every tribunal in the state.

The prerogative court in England is established for the trial of testamentary causes, where the deceased left *bona notabilia*, within two different dioceses. All causes relating to wills, administrations, etc., are originally cognizable before the judge of that court. An appeal lies to the king in chancery, by statute, 25 H. 8, c. 19; 3 Bl. Com. 65. It is a court of public and general jurisdiction: 3 Bl. Com. 61, 71. Private or special courts are forest courts, commissioners of sewers, and others mentioned: 3 Bl. Com. 71, 72. In all matters which fall within the jurisdiction of the orphans' court, it is a court of equity, and proceeds on the same principles as the court of chancery; and so it is in Pennsylvania, 2 Binn. 299; Cowper, 322; *Rex v. Grunden*. The temporal courts must consider the sentence of the ecclesiastical courts as final and conclusive till reversed. In Ambler, 761, this doctrine was reviewed and confirmed.

Now, I can perceive no principle upon which proceedings of the orphans' court can be distinguished from those of the ecclesiastical court in England, nor why its decrees should be examinable before every other tribunal in the state. If they may be examined here, or in the courts of law, so they may by any justice of the peace. In the case of *Robinson v. Perkins*, in the high court of errors and appeals, I understand that that court held itself bound by the decree made in the orphans' court, and made it the foundation of the account which was then taken between the parties. If the proceeding of the orphans' court may be examined in every collateral suit, the establishing of an appellate jurisdiction in the supreme court

was worse than useless; for it tends to mislead and deceive. As the orphans' court had complete power to inquire into all the matters touching the administration of Nicholas Van Dyke's estate and the sale of the land, I am of opinion that the proceedings of that court should be conclusive on this until they are reversed.

Bill dismissed.

AN EXECUTOR CANNOT BE A PURCHASER, either immediately or by means of a trustee, of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased: 2 Williams on Executors, 938; *Litchfield v. Cudworth*, 15 Pick. 23; *Yeackel v. Litchfield*, 13 Allen, 417; *Clark v. Blackington*, 110 Mass. 369; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Boyd v. Blankman*, 29 Cal. 19; *Miles v. Wheeler*, 43 Ill. 123; *Mickoud v. Girod*, 4 How. 503. And if he makes any profits by becoming a purchaser at his own sale he must account to the heirs therefor: *Jennison v. Hapgood*, 10 Pick. 77; *Richardson v. Spencer*, 18 B. Mon. 450; *Huston v. Cassidy*, 14 N. J. Eq. 320.

"The policy of the law is not to permit the same person to represent conflicting interests. Hence, trustees, sheriffs, constables, administrators, executors, guardians, and all persons vested with authority to sell the property of others are themselves forbidden from becoming interested in the sale. A sale made in violation of this rule will always be vacated on motion made in due time. But the only question strictly within the scope of our present inquiry is the effect of such a sale when no action is taken to set it aside. If the sale and conveyance be made directly to the administrator, sheriff, or other officer, it may well be declared a nullity, on the ground that one person cannot unite in himself the capacity of vendor and vendee—cannot, by the same act, transmit and receive: *Hamblin v. Warnecke*, 31 Tex. 94; *Boyd v. Blankman*, 29 Cal. 34; *Stapp v. Toler*, 3 Bibb. 450; *Dwight v. Blackmar*, 2 Mich. 330. But usually laws are sought to be evaded rather than openly violated. Hence, an administrator or sheriff, desirous of becoming the owner of property about to be sold by himself, will seek the aid of a friend, in whose name the purchase can be made and the title held for such time as will conceal the true nature of the transaction. In a case of this kind the officer cannot be permitted to profit by the transaction at the expense and against the will of the parties interested. On learning the true state of the facts, they may have the sale annulled; or they may affirm it, and permit it to stand. If they seek to annul it they are entitled to succeed, irrespective of the fairness or unfairness of the sale, or the motives which prompted the administrator or other officer or trustee: *Riddle v. Roll*, 20 Oh. St. 572; *Anderson v. Green*, 46 Geo. 361; *Potter v. Smith*, 36 Ind. 231; *Murphy v. Teter*, 56 Id. 545; *Smith v. Drake*, 23 N. J. Eq. 302; *Froneberger v. Lewis*, 70 N. C. 456; *Ryden v. Jones*, 1 Hawks, 497, 9 Am. Dec. 660; *Miles v. Wheeler*, 43 Ill. 123; *Ives v. Ashley*, 97 Mass. 198; *Bailey v. Robinson*, 1 Gratt. 4; *Green v. Sergeant*, 23 Vt. 466; *Merger v. Newsom*, 23 Geo. 151; *Moore v. Hilton*, 12 Leigh, 1; *Edmunds v. Crenshaw*, 1 McCord's Ch. 252; *Glass v. Greathouse*, 20 Oh. 503; *Guerro v. Ballerino*, 48 Cal. 118. But the sale is not void in the extreme sense. It cannot be attacked and overthrown by third persons. Neither can the heirs or other parties in interest treat it as

unqualifiedly void. They may confirm it either directly, or by their non-action continued for a long period of time after having notice of the true nature of the transaction. Such, at least, is the opinion of the majority of the authorities: *Litchfield v. Cudworth*, 15 Pick. 23; *Munn v. Burges*, 70 Ill. 604; *Boyd v. Blankman*, 29 Cal. 19; *Hicks v. Weems*, 14 La. An. 629; *Muselman v. Eshelman*, 10 Pa. St. 394; and the authorities cited above. In some cases, however, such a sale appears to have been held void: *Hamblin v. Warnecke*, 31 Tex. 94; *Michod v. Guiod*, 4 How. U. S. 503; *Miles v. Wheeler*, 43 Ill. 123. In New York, it is made void by statute. Sales made by sheriffs and constables, and in which they are interested, are, under the statutes in force in many of the states, held void:" Freeman on Void Judicial Sales, sec. 33.

ACQUIESCENCE BY THE HEIRS for a lapse of time will operate to render the purchase binding: *Brown v. Weaver*, 28 Geo. 377; *Todd v. Moore*, 1 Leigh, 457; *Lyon v. Lyon*, 8 Ired. Eq. 201. What length of time will suffice to produce this result depends upon the circumstances of the case. That the heirs must move to set aside the sale within a reasonable time has been affirmed by some of the courts: *Ives v. Ashley*, 97 Mass. 198; *Muselman v. Ashleman*, 10 Penn. St. 394; *Flanders v. Flanders*, 23 Geo. 249; *Green v. Sergeant*, 23 Vt. 466.

ROSS v. SINGLETON.

[1 DELAWARE CH., 149.]

- A MARRIED WOMAN**, who, under the belief that her husband is dead, such being the common report, sold certain lands, may recover them in ejectment against the purchaser. And there being no fraud, equity will not relieve.
- A MARRIED WOMAN** cannot, after the death of the husband, be compelled to perfect a contract void in its origin, or one which she was legally incompetent to execute.
- IN THE ABSENCE OF FRAUD**, accident or mistake, a court of equity will not relieve against a contract void at law. Nor will equity relieve a party against the consequences of a risk voluntarily assumed by him.

BILL for an injunction against a judgment at law obtained by the defendant herein, Sarah Singleton, plaintiff in an action of ejectment. The facts were: Joseph and Sarah Singleton held certain realty in right of the wife Sarah, the defendant. Joseph's interest was sold under an execution, and became vested in one Thompson. Singleton enlisted as a soldier in 1791, and was in the battle fought by General St. Clair with the Indians in November of that year. It was reported, and generally believed, that Singleton had been killed in the fight. Soon afterward Sarah applied to the complainant to purchase the land from her. This he declined to do. But upon her renewing the application, Ross finally entered into a contract for the purchase of lands, and by articles in writing dated Decem-

ber 1, 1794, he agreed to buy the land, and Sarah agreed to sell the same, for a stipulated sum, fifty-six pounds and five shillings of which was paid over. In 1800, Sarah insisted that the contract should be performed, asserting that she had received information warranting the belief that her husband had been killed by the Indians. In fact he had not been heard from up to that time, which was more than seven years after the battle in which he was thought to have perished. Under the advice of Samuel Cochran, a mutual friend, as well as of Thomas McKean, chief justice of Pennsylvania, who acted for Sarah, the deed was drawn, and the balance of the purchase-money paid in April, 1800. In 1808, Joseph Singleton returned, but his wife refused to cohabit with him, and he went to Kentucky, where he died. After his death, Sarah, in 1818, brought an action of ejectment against the complainant, who had obtained Thompson's interest, and had made many improvements on the land, and recovered judgment. This bill was filed to restrain further proceedings under the judgment at law, and prayed that defendant be decreed to make to complainant a good and sufficient deed, and that he be quieted in his possession.

RIDGELY, Chancellor, to whom the bill was presented in vacation, refused to grant an injunction, and assigned the following reasons therefor: The general question here is, whether a *feme-covert*, after she becomes *sole*, may be compelled to make good, or to execute a contract, which was void in its origin, and which she could not enter into?

In this case, no fraud can be imputed to either of the parties. The death of Joseph Singleton was equally unknown to both of them, and it appears by Mr. Cochran's testimony, which is annexed to the bill, and makes part of it, that on the first of December, 1794, when the articles of agreement were executed, the defendant only expressed her belief of his death, and said she thought he must be dead although she had no evidence of it; afterwards, when the deed was executed, in April, 1800, the length of time between his supposed death and that period alone seemed to confirm the parties in the opinion of his death. There was no imposition practiced on Mr. Ross, and no fact was concealed from him which she ought or could communicate to him. The purchase of the land was a hazard, a risk incurred by Mr. Ross voluntarily, and without any deception. Indeed, considering the notoriety of the transaction and the persons consulted, it is not to be believed that Mr. Ross was led into an error by any act, or concealment, or false suggestion. I am

satisfied from the deposition of Mr. Cochran that there was no fraud in the case at the time of the execution of the articles of agreement and deed, nor at any other time. Neither can I find in the whole affair any like accident or mistake. Ignorance is not mistake; neither is error in judgment a ground of relief. The parties blindly entered into a negotiation about the purchase of the land; and after more than five years Mr. Ross took a deed and paid the purchase-money, without a knowledge of the death of Singleton, the husband of the grantor, upon whose death the legality of the contract depended. To relieve in this case would be to relieve against the imprudence of Mr. Ross. He did not know that Sarah Singleton was a *feme-sole*. He knew that if her husband was alive she could not convey or grant the land; and knowing that, although the woman expressed her belief of his death, she had no evidence of it, he ventured on the purchase. It was altogether a calculation of chances, and he trusted to chance. The probability, indeed, was that the man was dead; but it was only a probability. In short, his eyes were open, and he must abide by the event.

But it is alleged in the bill that this woman executed the deed, received the purchase-money, and enjoyed great benefits from it; also, that the complainant expended considerable sums in repairs. All this, in the present stage of the proceeding, we must take to be true; but it is not sufficient to give validity to a transaction that is absolutely null. A contract made by a married woman, without the consent of her husband, is void; and a court of chancery cannot give validity to a contract void in law. The case of *Kenge v. Delavell*, 1 Vern. 326, has some resemblance to this. Sir Ralph Delavell and his lady, by reason of some discontents in the family, agreed to live separately, and there was a separate maintenance settled on the lady, and determinable on the death of either of them. She contracted several debts during the separation. Her husband died. A bill was then brought to subject her jointure to the payment of the plaintiff's debt. The lord keeper said that had the separate maintenance continued, there might be some reason for the creditors to follow that, and make it liable to their satisfaction; but that being determined by the death of the husband, he did not see which way the jointure could be charged with it. The reason why the separate estate might be charged was because, according to *Peacock v. Monk*, 2 Ves. sen. 190, and *Hulme v. Tenant and wife*, 1 Bro. Ch. 16, 20, a *feme-covert*, acting with respect to her separate property, is competent to act in all re-

spects as if she were a *feme-sole*; but, in all cases of separate property, the power which the *feme-covert* has over it arises from the agreement of the husband before or after marriage; and without the agreement she can do no act to affect it: 2 Ves. sen. 190; 1 Id. 163, 229, 517.

A married woman can enter into no contract that will bind her after her coverture. If she gave a bond she could not be sued upon it. She cannot personally bind herself, nor her executors or administrators: *Sockett v. Wray*, 4 Bro. Ch. 483, 487. In *Smith and Helen, his wife, v. French*, 2 Atk. 243, the case is stronger than this, and the principle is clearly laid down by Lord Hardwicke. A bill was brought for satisfaction of a breach of trust. The husband, after the marriage, conveyed his wife's fortune to the wife's mother, as her trustee, for her separate use. The trustee, at the importunity and repeated solicitation of the daughter, the *cestui que trust*, committed a breach of trust, by disposing of the trust money for the benefit of the husband, at his instance and request. The wife promised to release; and after she became a widow confirmed the promise. This confirmation alone secured the trustee. The promise of the wife during coverture could not bind her; and, although the case was extremely hard, Lord Hardwicke would have decided against the trustee, had he not found in the promise of the *cestui que trust*, after she became *sole*, a defense sufficient to rebut the plaintiff's equity. He compared it to the case of an infant under age, who, contracting a debt during his minority, shows his consent to it by confirming it after he becomes of age; which shall effectually bind him, though it was voidable at his election. So here, he said, a promise by the wife to release during her coverture, it is certain could not bind the wife; but if, after the death of her husband, she repeats her promise, that is a confirmation of it and is good. In that case there was cited from Hobart, 225, a case, 7 Edward IV., 14, in which the wife being a *cestui que use*, she and her husband sold the land. She received the money. They both required the feoffee to make the estate to the vendee; yet she, after her husband's death, in a court of equity, was relieved against the feoffee, and it was held she might also be against the vendee if he were privy to the use.

These cases, and the reason of them, fully establish the principle that a married woman can make no contracts during her coverture which shall bind her after she becomes *sole*, unless they be made conformable to certain rules established

to operate upon and bind married women. And if Sarah Singleton could be compelled to make a further conveyance to John Ross for the better assurance of this land; or, if she could be restrained from prosecuting to execution her judgment at law recovered in this action of ejectment, she might be compelled, directly or indirectly, to give effect to a contract void both at law and in equity. Supposing that the complainant has made out his whole case in his bill, with the depositions annexed, I see no ground upon which I can order the writ of injunction; and although I have been obliged to form a decided opinion upon this application for a writ of injunction, yet I shall be extremely willing to change my opinion if the plaintiff shall be able to satisfy me that it is erroneous. It certainly is a hard case, and I regret that I cannot comply with the prayer in the bill for a writ of injunction: See *Bolton v. Williams*, 2 Ves. jun. 138; *Jones v. Harris*, 9 Id. 486.

A case of intentional fraud on the part of the defendant having been established by proofs to the satisfaction of the chancellor, a decree was made perpetually enjoining the defendant from prosecuting to execution her judgment in the action of ejectment at law. This decree was affirmed by the high court of errors and appeals at the June term, 1824.

"THE ACTS AND ADMISSIONS OF A MARRIED WOMAN cannot be used to render effectual a void conveyance of her real estate. She is not thus to be deprived of that protection which the law affords. Her title to land can only be divested by such conveyance as the statutes authorize: *Lowell v. Davis*, 2 Gray, 161; *Bemis v. Call*, 10 Allen, 512." Per Colt, J., in *Pierce v. Chace*, 108 Mass. 254, 259. And the fact that the purchaser of real estate from a married woman, went into possession, and made valuable improvements under the contract, which was void in law, will not estop her from asserting her title thereto at law: *Bispham's Equity*, sec. 293; *Drury v. Foster*, 2 Wall. 24; *Miles v. Lingerman*, 24 Ind. 385. "The doctrine of estoppel is not applied to the case of a party incapable in law of making a contract, and she (the married woman) is therefore not estopped to deny the validity of the conveyance:" *Merriam v. Boston etc. R. R. Co.*, 117 Mass. 241. Where the deed of a married woman fails as a conveyance from the nonconcurrence of her husband, it is ineffectual for all purposes, and cannot be relied upon as an estoppel or ground of recovery in a subsequent controversy: *Herman on Estoppel*, sec. 215. A repayment of the consideration received or compensation for the improvements made by the purchaser in possession is not a condition precedent to the wife's right to recover: *Rumfelt v. Clemens*, 46 Penn. St. 455; *Glidden v. Strupler*, 52 Id. 400

WILDS v. LAYTON.

[1 DELAWARE CH. 226.]

AN INJUNCTION WILL LIE to restrain a tenant by *elegit* from tilling a farm contrary to the established rotation of crops on it and contrary to the usage of that part of the country.

WASTE is whatever tends to the destruction of the inheritance or to its depreciation in value, and may be committed of land as well as in houses and timber.

BILL for an injunction to stay waste, setting forth the following facts: The complainants and two of the defendants were the heirs at law of John Wilds, deceased. Layton was in possession of certain lands belonging to John Wilds, as tenant by *elegit* under two judgments recovered against J. Wilds' administrator. The writs of *elegit* under which Layton held had been issued after the return of the viewers that the lands would rent for a sum sufficient to pay the liens against them in seven years. The bill further alleged that Layton received the rents but appropriated them to his own use instead of applying them in discharge of the debts, and that he was disregarding the rotation of crops that had always been observed in tilling the lands and had been the practice prevailing in that part of the country; that Layton was tilling the fields faster than had been customary, to the great waste and impoverishment of the farm, and faster than the viewers had calculated upon in estimating the value of the farms under the extent; and that Layton being in possession under legal process ought to observe the usual rotation of crops. The rotation of crops alleged was conducted by planting but one third of the farm yearly in Indian corn in the spring, and seeding the same in wheat in the fall, and by planting different thirds in successive years, whereas, the defendant Layton was proceeding to plant two thirds of the farm in Indian corn. The bill prayed an injunction to restrain the planting of Indian corn in any portion of the farm than in that which in the regular course of rotation ought to be tilled, that the rents be applied in discharge of the debts and for general relief.

Hall, for the complainants.

RIDGELY, Chancellor, granted the order, assigning the following reasons, viz: I am of opinion that it would be waste to till the farm contrary to the established rotation of crops on it, and contrary to the usage of that part of the country. I also think

that the tillage complained of was contrary to good husbandry; but more especially was it improper, as on the *elegit* the price and extent had been made with a view to the established rotation of crops. Whatever tends to the destruction of the inheritance, or to its depreciation in value, is considered by the law as waste, and may be committed of land as well as in houses and timber. A defendant may be restrained from opening mines: 2 Atk. 182-3. So an injunction may go to restrain a tenant from doing damages, and from removing crops and manure except according to custom of the country: 16 Ves. jun. 173. The cultivating or using of land in a grossly unhusbandlike manner, it is said in 1 Mad. Ch. Pr. 138, may be restrained by injunction. Any abuse of the land by the tenant which tends to its injury ought to be restrained. The working a field two years successively in Indian corn is reputed to be highly injurious.

In the case of *Lord Barnard*, Prec. Ch. 454; 1 Eq. Cas. Ab. 400; cited in 2 Harrison Ch. Pr. 182, where the defendant had defaced the mansion-house, and was going on entirely to ruin it, a writ of injunction was granted, and a commission was ordered to issue to six commissioners, whereof the defendant was to have notice, and to appoint three on his part, or in default thereof, the six commissioners to be named *ex parte*, to take a view and to make a report of the waste committed.

Injunction granted.

Upon the issuance of an injunction to restrain a trespass, see *Jeroms v. Ross*, 11 Am. Dec. 484, and note.

A case containing exactly the same facts as in the principal case, so far as the nature of the injury to the soil complained of is concerned, received a different exposition in *Richards v. Torbert*, 3 Houst. 172. There it was held that injudicious or ill husbandry, or tilling land in an unhusbandlike manner, or bad farming merely "by any kind of a tenant," whether for life or for years, did not constitute an injury to the inheritance for which an action for waste would lie.

EX PARTE DIXON.

[1 DELAWARE CH. 261.]

THE DEATH OF A JOINT JUDGMENT-DEBTOR does not discharge the lands of the deceased from the lien of the judgment, and in case the decedent were the principal debtor, his lands alone would be first subjected in equity to the payment of the debt, so as to bar a suit by the judgment-creditor to recover satisfaction out of the lands of the survivor, a surety.

MOTION to have certain funds applied in satisfaction of a judgment. It appeared that under a decree of this court, the lands of Thomas Phillips were sold to satisfy a judgment obtained against him, and the proceeds paid into the court; that there was more than was necessary to discharge that judgment, whereupon this motion was made to have the surplus applied in payment of a judgment recovered in favor of one Chandeler, to the use of Dixon, against John Phillips and Thomas Phillips, jointly. The motion was resisted, and a case containing the following facts submitted for the opinion of the chancellor. The judgment in favor of Chandeler was on a bond in which John Phillips was the principal and Thomas was surety, and was obtained against them jointly. John Phillips afterwards died, and his lands were sold by the sheriff, Haughey, pursuant to an execution issued under a junior judgment against John Phillips alone. Dixon instituted suits against Haughey and his bondsmen for failing to apply the proceeds of the sale of John Phillips' land to the satisfaction of Chandeler's judgment. But by reason of the insolvency of Haughey and his sureties, the judgments against them in Dixon's favor were ineffectual. Wherefore payment was sought through this motion.

Brinckle, in support of the motion.

Wales, for a subsequent judgment-creditor of Thomas Phillips, *contra*.

RINGELY, Chancellor. It has been contended by Mr. Brinckle that by the death of John Phillips this judgment survived and became the debt of Thomas Phillips alone; that it ceased to be a lien on the real estate of John Phillips, and that Dixon's executors had no remedy at law against the representatives of John Phillips, nor against sheriff Haughey; and further, that as Dixon's executors never recovered and could not recover the debt from the sheriff or his sureties, he has a better title in equity to receive it out of the proceeds of the real estate of Thomas Phillips, against whom the judgment survived, than any subsequent judgment-creditor.

I doubt extremely the position that the lands of John Phillips had become exonerated of this judgment by his death; and that the whole debt fell upon Thomas Phillips, and that he and his real estate became alone chargeable with it. By our act of assembly for taking lands in execution for the payment of debts (1 Del. Laws, 109) it is declared that all lands, tenements, or hereditaments, whatsoever, within this government,

where no sufficient personal estate can be found, shall be liable to be seised and sold upon judgment and execution obtained; and this provision is made that no creditors may be defrauded of their just debts due to them from persons who have sufficient real estate to satisfy the same. This judgment in the life-time of John Phillips, was binding on his real estate, which, by the act of assembly, was liable to be seised and sold upon an execution issued thereon. The law does not require that the execution should issue in the life-time of the debtor, but it must be issued upon the judgment which binds the land; and the judgment binds the land until it is satisfied, or until the land is sold upon that or some other judgment. All the lands of both debtors were bound by the judgment, and I cannot perceive how this express provision can be avoided by the death of John Phillips. If by his death this judgment were to survive against Thomas Phillips alone, it might so happen that the act of assembly would be entirely defeated; for suppose a prior judgment to have been recovered against Thomas Phillips, of an amount greater than the value of his whole personal and real estate, the creditor would lose his debt, although John Phillips' real estate was sufficient to satisfy it.

In England lands were not liable to execution in personal actions for debt or damages except in the case of the king, or where the chattels of the debtor were not sufficient to answer the debt, or in an action of debt against an heir upon an obligation made by the ancestor. In the latter case the reason was that the goods and chattels of the debtor belonged to the executor or administrator, and if the lands were not liable in the hands of the heir, the creditor could have no fruit of his action: *Herbert's case*, 3 Co. 11; 2 Bac. Abr. 328-9, Execution A; Plowden, 440; Hob. 60.

The statute of Acton Burnell, 11 Edward I., first made burgages devisable liable to be sold upon certain recognizances therein mentioned. Soon after, in 13 Edward I., the statute of merchants followed, which made it lawful for a debtor to sell his lands and tenements for the discharge of his debts (recognizances) and if this was not done in a reasonable time, the lands and goods of the debtor might be delivered to the merchant by a reasonable extent, to hold them until such time as the debt should be wholly levied. These statutes were made with a view to commerce, and to enable the merchant to secure his debts by the recognizances or bonds of record, and afterwards, on failure of payment, to subject the lands, as well as chattels, to execu-

tion. In the same year, the statute of Westminster 2, 13 Edward I, enacted, that "when a debt is recovered or acknowledged in the kings courts, or damages awarded it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *feri facias* unto the sheriff, for to levy the debt of the lands and goods, or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his plow, and the one half of his land, until the debt be levied upon a reasonable price or extent, and if he be put out of that tenement he shall recover by a writ of novel disseisin, and afterwards by a writ of re-disseisin, if need be." This last is the first statute which subjected lands to execution on a judgment or recognizance at common law. The two former statutes were made to subject lands to execution to satisfy certain securities created by them, as statutes merchant, statutes staple, and recognizances in nature of statutes staple: *Herbert's case*, 3 Co. 11; 2 Bac. Abr. 328, Execution A.; *Thretheroy v. Achland*, 2 Saund. 48, 49, part 1; *Underhill v. Devereaux*, 2 Saund. 67, 68, part 1, and the notes by Sergeant Williams to that case. And by the statute of Westminster 2, as all the lands are bound, a joint lien shall not survive, for in executions which concern the realty and charge the lands, the sheriff cannot do execution on the land of one only: 3 Co. 14a. In 5 Com. Dig. 775; Pleader, 3 L. 3, it is said, that "if the judgment be against two, and one dies, a *scire facias* shall be against the survivor, *quare* execution against his goods and a moiety of his lands, and against the heir and *terre tenants* of the deceased, *quare* execution against them for a moiety of his lands *habere non debet*." He cites Carth. 107. In *Smart v. Edson*, 1 Lev. 30, it was adjudged, that "if a judgment be against A. and B., and one dies, a *scire facias* lies against the survivor, and the plaintiff may proceed against him as to the personalty, or he may proceed against the survivor and the heir and charge the lands of both, and if he will take execution on the lien real the charge ought to be equally against both and the *scire facias* against both." And in *Pennoir v. Brace*, 1 Salk. 320, Holt, C. J., held, that a *capias* or a *feri facias* being in the personalty, might survive and might be sued against the survivors without a *scire facias*, otherwise of an *elegit*, for there the heir is to be contributory. From all the authorities it is clear that a personal execution will survive, but that a real one will not: See 3 Co. 14; 4 Mod. 315; 4 Bac. Abr. 417, *Scire Facias*, c. 5; and the notes in Saunders, before referred to.

The English statute which gives the *elegit* is not more express in charging judgments on land than is our act of assembly; and, indeed, the words used are not as comprehensive as those of the act of assembly. Upon the authorities before referred to, and upon the reason and intention of the act of assembly, I am of opinion that this judgment did not survive against Thomas Phillips alone, but that all the lands originally bound remained liable to it until the sale was made by sheriff Haughey of the lands of John Phillips upon the judgment of John and George McCalmont; and then the money in Haughey's hands was applicable to this judgment, and was a satisfaction of it. At that time the lands of Thomas Phillips became discharged, and had the plaintiff after that sale attempted to recover the money of Thomas Phillips, a court of equity would have restrained him. I can have no doubt that in equity the land of John Phillips alone ought to have been subjected to this debt; and that if a recovery had been at law against Thomas, John would have been compelled by a court of equity to reimburse him. John borrowed, and had to his own proper use the money for which this bond was given, and upon which this judgment was entered. Thomas was his surety only. In such case, a court of equity will presume a mistake in point of fact, in every case where a joint obligation has been given, to set up the debt against a deceased obligor: See 8 Wheat. 214. Upon this principle the executor of Dixon had a remedy in equity against the estate, or rather the representatives of John Phillips, and the sheriff was responsible to him, on the sale, for the amount of the debt. The executor of Dixon can take nothing by his motion, and this money must be distributed among the other judgment-creditors of Thomas Phillips.

WHEN ONE OF SEVERAL JUDGMENT-DEFENDANTS DIES, satisfaction may be sought solely by seizing the persons or levying upon the personal estates of the survivors, in which cases no *scire facias* is needful to authorize the issue of execution: *Wade v. Natl*, 41 Miss. 248; *Howell v. Eldridge*, 21 Wend. 678; *Thompson v. Bondurant*, 15 Ala. 346; *Reams v. McNail*, 9 Humph. 542. But the lands of the deceased judgment-debtor are chargeable equally with those of the survivor for the satisfaction of the judgment: Herman on Executions, sec. 84; and the execution may be levied upon the real as well as upon the personal estate of either: *Martin v. Branch Bank*, 15 Ala. 594; *Hardin v. McCause*, 53 Mo. 255; Freeman on Executions, sec. 36.

LOCKWOOD v. STRADLEY.

[1 DELAWARE CH., 298.]

A CLAUSE IN A WILL directing the executors to sell all the estate of the testator, real and personal, and distribute the proceeds among certain named legatees, vests no estate in the executors, but the real estate descends to the heirs at law.

THE TRUST IN THE EXECUTORS to sell is a personal confidence, and cannot be executed by an administrator with the will annexed. But the trust may be executed by the court, where the property given and the objects to be benefited are certain.

TO MAKE A PERFECT TITLE under an order of sale made by the court, the heirs at law of the testator are proper parties, and must be decreed to join in the deed of conveyance.

WHERE AN INFANT IS PARTY to a suit and a decree is given against him, he should be allowed a day on arriving at maturity, to show cause against such decree.

BILL filed by the legatees and administrator, *c. t. a.*, of Thomas Candy against the heirs at law of Candy, setting forth the will, wherein was a clause directing the executors therein named to sell all the real and personal property of the testator for the benefit of the legatees. This portion of the will is recited in the opinion. The executors refused to qualify, and this application was made to have the will of the testator carried into effect. The answers admitted the execution and probate of the will, and bequests therein contained, and all the other facts and matters set forth in the bill. Sarah C. Brown, an infant niece of the testator, and an heir at law, answered by her guardian *ad litem*.

H. W. Bates, for the complainants.

Frame, *contra*.

RIDGELY, Chancellor. This case has been submitted to the chancellor upon the bill and answer, without debate, and without any authorities being produced to him on either side, and it seems to be apparent that all the parties in this suit consider it to be a matter of course that a decree should be made for the sale of the real estate of the testator, to give effect to his will. One of the defendants, Sarah C. Brown, who is one of the heirs of the testator, is an infant; and that circumstance alone, according to the apparent disposition of the other defendants, who are also heirs and are of full age, has made it necessary to apply to this court for the sale of the land; for had the whole estate descended to those alone, that is, to the

heirs of full age, they might have conveyed the land without the aid of this court. But the infancy of Sarah C. Brown would render the title of the purchaser under the other heirs incomplete. The object now is to sell the land, notwithstanding the renunciation of the executors and the infancy of one of the heirs, according to the intention of the testator as expressed in his will. But this cannot be effected finally, so as to conclude Sarah C. Brown, the infant; for the answer of the infant by her guardian will not conclusively bind her.

In the case of *Wrotterly v. Bendish*, 3 P. Wms. 235, note e, it was ruled by Sir Joseph Jekyll, that where a defendant puts in an answer to a bill brought by an infant, who does not reply to it, the answer must be taken to be true, in regard that the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove the answer, and he ought not to suffer from such omission in the plaintiff. But in *Legard v. Sheffield*, 2 Atk. 377, Lord Hardwicke said that an infant can admit nothing, and therefore his not replying does not affect him; and he directed evidence to be read to make out a pedigree stated by a defendant in his answer, the infant plaintiff not replying to the answer, that he might judge whether it was clearly made out that the defendant was an heir at law. The hearing must have been upon bill and answer, and the answer was not taken as true against the infant. And in *Strudwick v. Pargiter*, Bunbury, 338, an infant, it was ruled that no exceptions could be taken to an infant's answer put in by his guardian, by which he could not be concluded and might amend when he came of age. And so, in *Copeland v. Wheeler*, 4 Bro. Ch. 256, it was admitted that exceptions will not lie to an infant's answer.

The course in such a case is for the cause to proceed, and, should there be a decree against the infant, to give him a day after he comes of age to show cause against the decree, provided he has such cause. By this will of Thomas Candy the real estate is not devised to any one, but has descended to the heirs at law, and consequently they are properly made parties; and, according to the authorities, a day must be given to the defendant, Sarah C. Brown, who is an infant. In *Cook v. Parsons*, Prec. in Chan. 184; 2 Vern. 429, on a bill of review, an error was assigned that the land was decreed to be sold pursuant to the will, without giving a day to the heir, an infant, to show cause after he came of age; but this was held to be no error, because the land was devised to trustees, so that nothing

descended to the infant, and there was no decree against him to join, and the trustees might have sold without coming to the court for direction; yet it is there said that if they do come it may be a question if the infant ought not to have a day to show cause; but it was not needful there as nothing descended to him, nor was there any decree against him to convey. In this suit there will be a decree against the infant, Sarah C. Brown, and she will be directed to join in the conveyance. *Scarth v. Cotton, cas. temp.*, Lord Talbot, 198, is a remarkable instance of the parol demurring. An estate had been conveyed in trust to be sold to pay debts and incumbrances upon it, and then in trust for the grantor's own right heirs. The grantor died. A bill was filed by a bond creditor for the sale of the estate against the trustee and the heir, an infant. The infant by her answer insisted that being an infant the parol ought to demur because, although it was a trust for paying off incumbrances which then affected the same, yet as to the residue, it was only assets. The lord chancellor thought that although in this case it would be to the infant's prejudice to take advantage of the law, because the interest would outrun the rents and profits of the estate; yet, it being mentioned in the pleadings, he said he could not avoid ordering it, although the counsel would have waived the objection. And so an order was made to take an account of what was due to the plaintiff, but all proceedings to stay until the infant defendant came of age, and the plaintiff to pay all parties their costs except the infant, and to have them again out of the estate.

In *Blatch v. Wilder*, 1 Atk. 420, 421, it was adjudged that where lands are devised to trustees to be sold for payment of his debts, and the heir is an infant, he has no day given him; otherwise, when there is no devise expressly to any particular person, for in that case he has his day. There, the land was not expressly devised, and it was directed that the infant, the customary heir of copy-hold premises, should join in the sale thereof on attaining the age of twenty-one years, unless within six months after he shall attain such age, he show good cause to the contrary, and the purchaser of the copy-hold, in the meantime, to hold and enjoy the same. *Uvedale v. Uvedale*, 3 Atk. 117, J. W., by his will, directs his real estate to be sold, after his wife's death, and the money arising therefrom to be equally divided between R. U., and five other persons. The bill is brought by the wife, a creditor. R. U. is an infant, and as heir at law to the testator, had the legal interest in the estate.

Although the usual practice is for the parol to demur, yet it being for his (B. U.'s) interest that the estate should be sold, and as in this case there was a trust to be performed, and the court can see to the proper application of the money, Lord Hardwicke decreed a sale, but declared at the same time, that he did not mean by this direction to break in upon the rule of parol demurring.

There was a decree of foreclosure against an infant on a mortgage, with a day to show cause, in *Goodier v. Ashton*, 18 Ves. jun. 83, but this has been altered in *Monday v. Monday*, 1 V. & B. 223, where an order was made directing, in case the mortgagees consent to a sale, an inquiry whether it would be for the infant's benefit: See *Fountain v. Cain & Jeffs*, 1 P. Wms. 504. It is evident, from all the cases, and from principle, too, that when the estate directed to be sold has not been devised away, but has descended to the heirs at law, they should be decreed to join in the sale (an infant heir after attaining the age of twenty-one years), and that a day should be given to the infant, after arriving to the age of twenty-one years, to show cause. In the present case, the testator has not devised the estate to any one, and therefore it is the estate of the heirs; and the sale to be decreed will be of their legal estate, subject to the trust created by the will of the testator, and for the purpose of having the trust executed. The principal question under this will is, whether this is a trust to be executed by this court, or whether it is a mere power which this court cannot execute.

The testator devised thus: "It is my will that my executors hereinafter named, and the survivor of them, do sell and dispose of all my estate, real and personal, wheresoever and whatsoever, at such time or times as they, or the survivors of them, can do it to the best advantage, and either at public or private sale, as they or he may think in their or his discretion. All moneys arising from such sales, as also from all other my estate whatsoever, I direct to be placed out and kept at use, on good and sufficient landed security, for the benefit of the hereinafter described legatees; and after the payment of my debts and the necessary expenses in settling my concerns, and the specific legacy above mentioned, then I will that all the rest, residue and remainder, together with the interest which shall accumulate thereon, be divided into seventeen equal parts or shares, three of which parts or shares I give and bequeath to the children of my eldest sister, Susanna Stradley, which are now born

and to those which shall hereafter be born to her, who shall attain to the age of twenty-one years, to be paid to them when and as they shall severally attain that age, in equal shares, as tenants in common." So he gave eight parts of said money and interest to the children of his sister Sophia, born or to be born, and the remaining six parts to the children of his sister, Ann Walker, born or to be born, and then he provided for the death of any of the children.

By the renunciation of the executors, the trust has not been executed, and the administrator, William K. Lockwood, cannot execute it by any authority he now possesses. The authority to sell was given to the executors. It was a confidence placed in them by the testator. It was personal, and cannot be performed by the administrator. *Yates v. Crompton*, 2 P. Wms. 306, was a case very similar to this. There, the testator devised that his executors should sell land, and with the money arising from that sale and the surplus of his personal estate, should purchase an annuity of one hundred pounds to J. S. for life, out of which she should maintain her children; and he gave thirty pounds to each child, to be raised out of said annuity; and the personal estate he should die possessed of, and the overplus, he gave to J. S., and made B. and C. executors. The testator died, and the said J. S. died within three months after. The executors renounced. Administration, with the will annexed, was granted to Yates, the plaintiff, who was also the administrator of J. S., the intended annuitant. He, with the children of said J. S., brought the bill against the heir of the testator to compel him to join in a sale of the lands; and it was decreed that the land should be sold. Now, if the administrator could have sold the land, no bill would have been brought, nor any decree made, for that purpose. In Pennsylvania, *Moody's Lessee v. Van Dylke*, 4 Binn. 31 [5 Am. Dec. 385], it was adjudged that administrators with the will annexed could not sell where the executors had renounced, and such is the law here.

As the executors have renounced, and as Lockwood, the administrator with the will annexed, has no authority to sell, this becomes a trust to be executed by this court; for this land and personal estate is clearly and explicitly given to the children of the testator's sisters. The master of the rolls, in *Pierson v. Garnett*, 2 Bro. Ch. 38, says that Lord Thurlow in *Harland v. Trigg*, 1 Bro. Ch. 142, and in *Wynne v. Hawkins*, Id. 179, has laid down the true principle, that where the property to be

given is certain, and the objects to whom it is given are certain, there is a trust to be executed: See 2 Id. 226. In the cases of *The Duke of Marlborough v. Godolphin*, 2 Ves. sen. 61; *Harding v. Glynn*, 1 Atk. 469; *Brown v. Higgs*, 4 Ves. jun. 708; 5 Id. 495; 8 Id. 561, and in many other cases there cited, much controversy arose on the non-execution of a power and a trust, and on the difference between a power and a trust; but as, according to all those cases, this is a trust, there can be no doubt that the court can cause it to be executed.

A decree was entered for the sale of the lands and premises described in the bill, to be made by William K. Lockwood, a trustee appointed for that purpose by the chancellor; and that the proceeds of such sale, after the payment of all costs in the cause, should be applied by the said trustee according to the trusts of the last will and testament of Thomas Candy, deceased. The decree further directed that the heirs at law of the testator, who were parties to the cause, should join with the trustee in a deed conveying the premises to the purchaser thereof. And with respect to the infant, Sarah C. Brown, who was one of the heirs at law, it was decreed as follows:

And it is ordered, adjudged and decreed by the chancellor, that the said Sarah C. Brown, one of the defendants, do, when she, the said Sarah C. Brown, arrives at the age of twenty-one years, convey and assure to such purchaser, his heirs and assigns forever, by a good and sufficient deed, the said lands and premises, with the appurtenances, and that she acknowledge the same in due form of law. And it is ordered, adjudged, and decreed by the chancellor, that this decree is to be, and shall be binding upon the said Sarah C. Brown, the infant, unless she, the said Sarah C. Brown, shall in six months after she shall attain the age of twenty-one years, being served with process for that purpose, show unto this court good cause to the contrary; and in the meantime, that the said purchaser do hold and enjoy the said land and premises with the appurtenances.

WHETHER THE EXECUTOR TAKES AN INTEREST in lands intrusted to him under a will to sell, or is clothed merely with a power of disposition, is said by Williams in vol. 1 of *Executors*, to turn upon this distinction: "A devise of the land to executors to sell passes the interest in it, but a devise that executors shall sell the land, or that lands shall be sold by the executors gives them but a power." In *Romaine v. Hendrickson*, 24 N. J. E. 231, the chancellor, passing upon a clause in a will which directed that the testator's family should reside upon his farm, but, that in case the executors should at any time think it more advantageous for his family to sell the farm, then to sell the same, said: "The power of sale is not one that is to be exercised on the happening

of a certain event or at a given time, but is wholly discretionary, not only as to the time of sale but as to whether the sale shall ever be made. It may never be exercised. It is a power and not a trust. The land was not devised to the executors, and in the meantime, until the sale, the title is in the heirs and they have power to transfer their interest in it, at all events, so far as to entitle the alienee to all their rights, whatever disposition should be afterwards made of it: *Den v. Snowhill*, 3 Zab. 447; *Den v. Creveling*, 1 Dutch. 449; *Herbert v. Tutill*, Saxt. 141; *Gest v. Flock*, 1 Green's Ch. 108; *Fluke v. Fluke*, 1 C. E. Green, 478." So, also, 1 Sugden on Powers, sec. 132-134.

A POWER GIVEN TO AN EXECUTOR, by name, or *virtute officii*, to sell lands of the testator, is considered by the courts of New York to be distinct from the authority conferred upon the executor by the will to manage the estate, as such. He is regarded as existing in a two-fold capacity, that of trustee and that of executor. Proceeding according to this view, an administrator with the will annexed has only the powers of the executor in his official character, and not those bestowed upon him by reason of a personal confidence. And in conformity with this idea, it is not held to make any difference whether the trust to sell was given to the executor, naming him, or was given to the person, indifferently, who happened to be appointed executor. Judge Cowen, delivering the opinion of the court, after an exhaustive examination of the principles bearing upon the point before him, said, in the leading case in New York, of *Conklin v. Egerton*, 21 Wend. 430, 439: "So far from feeling no doubt that the administrator may convey under the statute, I have been unable to resist the conclusion that Mr. Hart's (the executor's) capacity as the donee of a common law power under the will, not being that of an executor in any legal sense, it cannot be made the subject of a statute which professes to translate the power of an executor to another." The statute here referred to was as follows: "In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed, and the administrators with such will annexed shall have the rights and powers and be subject to the same duties as if they had been named executors in such will." The construction placed upon this section by Judge Cowen was after some hesitation recognized in *Roome v. Phillips*, 27 N. Y. 357, 363, and finally adopted in *Dunning v. Ocean National Bank*, 61 N. Y. 497. In this last citation the point arose upon the clause in a will devising a certain farm to "executor hereinafter named," upon certain specified trusts, and among others, to mortgage or sell the same as "he, the executor, shall deem most for the interest of," etc. An administrator with the will annexed was appointed, in the consideration of whose power the doctrine of *Conklin v. Egerton* was approved.

OTHER STATES interpreting similar sections concerning the powers of administrators with the will annexed, draw a distinction between the cases where the trust to sell is personal in its nature, and those where the power to sell is without any special confidence in the person named as executor. "Where it is evident from the will that a personal trust is created" a trust to executors to sell lands does not pass to the administrators *cum testamento annexo*: *Anderson v. McGowan*, 42 Ala. 280. Had the power been given *virtute officii*, it seems from this case that it might have been executed by the administrator. So, also, *Bailey v. Brown*, 9 R. I. 79, permitting the administrator with the will annexed to execute the trust, where, from the context of the will, it appeared not to have been personal in its nature. In

Pennsylvania, *Evans v. Chew*, 71 Penn. St. 47, and in Kentucky, *Shields v. Smith*, 8 Bush. 601, the administrator with the will annexed may sell the lands, as was directed that the executor should sell, and no line is drawn between the trust created *virtute officii* of the executor, and between the trust based in personal confidence. Such also appears to be the result of the examination of authorities in *Brown v. Armistead*, 6 Rand. 594; and *Hester v. Hester*, 2 Ired. Eq. 330. In *Kidwell v. Brumagin*, 32 Cal. 436, the court applying the statute conferring the powers of executors upon administrators *cum testamento annexo* to the facts before them, allow the sale by the administrator, and in the course of their opinion say that the authority to sell given by the will did not die with the executor, but that "it was clearly given *virtute officii*."

It is noticeable that in all these decisions, permitting the performance of the trust by the administrator, the courts have based their opinion upon a change in the common law worked by some statute similar in import to that which received the attention of the court in *Conklin v. Egerton*, 21 Wend. 430. As was above observed, the New York cases do not allow the trust to devolve upon the administrator with the will annexed. But to prevent the failing of the trust, a court of equity will appoint a trustee: *Roome v. Phillips*, 27 N. Y. 363; *Dunning v. Ocean National Bank*, 61 Id. 497.

HUGHLETT v. HARRIS.

[1 DELAWARE CH. 349.]

WASTE, WHO MAY HAVE ACTION FOR.—At the time the waste is committed, the party must have title to the land, to sustain his action for the injury.

FULL RELIEF IN EQUITY IS GIVEN to prevent a multiplicity of suits, where an injunction has issued to restrain a wrong, but this principle is limited to cases where a right to relief exists for injury already done, independently of the injunction to prevent future injury. Accordingly a judgment-creditor who sues out an injunction to restrain waste upon land covered by the lien of his judgment, and pending the injunction purchased the land at the sheriff's sale, cannot recover for the waste committed prior to his purchase.

BILL to account for waste. Hughlett sold the premises in question to R. S. Harris in 1807 and 1808, taking for the purchase-money two judgment bonds, upon which judgments were entered. R. S. Harris died in 1827, having previously conveyed the premises to his two sons, defendants herein. After their father's death the sons proceeded to make many alterations in the premises, cutting down timber, removing fences, etc. Whereupon Hughlett sued out an injunction to restrain waste, the judgments being still unpaid. Pending the injunction the premises were sold by the sheriff to satisfy Hughlett's judgments, and were bought in by him. The widow was a party defendant. The answer of the defendants relied chiefly

upon the fact that at the time complainant's bill for an injunction was filed, he had no title to the premises.

H. W. Bates and H. Stout, for the complainants.

John M. Clayton, contra.

JOHNS, Sr., Chancellor. In this case there is now no question to be decided as to the right of having an injunction to prevent waste. It was obtained and has had its designed effect to prevent future wrong, or waste, as it is called. The injunction was permitted to continue, and since it was issued the complainant has obtained the title to the land and the possession.

The complainant having restrained the commission of further waste, as it is called, now seeks to obtain an account of the waste done for the purpose of thereafter obtaining a decree for the amount of the damages. The question to be decided is, whether the court will decree an account to be taken in such a case as this. The acts alleged to be done and complained of were done by the persons having at the time the fee-simple title to the lands, and the person now claiming an account then had no title. I can find no case in the books to warrant a decree for an account in such a case as this, and am of opinion that the complainant is not entitled to such a decree. The principle laid down in 1 Madd. Ch. Pr. 149, that where an injunction is obtained to prevent a wrong, a court of equity will, in order to prevent a multiplicity of suits, proceed to give full relief, must be understood to apply to those cases where the party has not only a right to the injunction to prevent future wrong, but also to have relief in a court of equity for the wrong previously done. To extend the principles further would bring many cases into chancery, which properly belong to the courts of common law.

The jurisdiction of the court of chancery in England has been much enlarged by modern decisions, and if those decisions are to be considered law in this state, they will prostrate the limits fixed by the act of assembly (Del. Dig. 103) to the powers of our court of chancery. When it becomes necessary I shall not hesitate to express an opinion as to the limits of chancery jurisdiction in this state. But in this case that will be unnecessary, because I am of opinion that even in England the court of chancery would not decree an account, and afford relief to this complainant, he having no title to the land at the time when the acts complained of were done by a person who then had the fee-simple.

The second ground of defense, the want of equity in the circumstances, it is unnecessary to consider.

Bill dismissed with costs.

A LEGAL TITLE IN THE PLAINTIFF IS NECESSARY to support an action of waste: *Gillett v. Treganza*, 13 Wis. 472; *Whitney v. Morrow*, 34 Id. 644; *Loudon v. Warfield*, 5 J. J. Marsh. 196.

In Pennsylvania, however, it is held that a *cestui que trust*, after attaining full age, can maintain an action for waste against the trustee, without first obtaining a conveyance of the legal title: *Wyant v. Dieffenderfer*, 2 Grant, 334. And in *Woodman v. Good*, 6 Watts. and S. 169, an equitable tenant for life was considered liable in an action of waste at the suit of a holder of the legal title in trust.

LOFLAND v. MAULL.

[1 DELAWARE CH. 359.]

A DEBTOR IS ENTITLED TO SET OFF in equity payments made by him to discharge indebtedness of the plaintiff to third person, and this although the debtor showed no authority to make the payments.

THE ONUS OF PROVING the existence of debts sought to be set off by the defendant is not thrown upon him where the plaintiff excepts to the defendant's sworn account filed in answer to the bill.

INTEREST DOES NOT RUN on the unpaid purchase-money stipulated to be paid on a contract for the sale of land, where the terms do not provide for the payment of interest, nor will the obtaining possession under the contract create an equitable obligation to pay interest.

BILL for an accounting. The opinion states the case.

Robinson, for the complainant.

J. M. Clayton and Layton, contra.

JOHNS, Sr., Chancellor. The bill is filed by a vendor of land against the purchaser for an account and for the recovery of a balance of the purchase-money. An account was decreed and taken, from which it appears that the purchaser has paid, within the times mentioned in the written contract, the whole purchase-money and thirty-two dollars and thirty-two cents over. This result depends upon the allowance to the defendant, as credits in the account, of certain debts which he claims to have paid for the complainant, and also upon his not being charged with interest on the purchase-money before the installments became due. The complainant's counsel objects to the account upon two grounds: First, that a part of the debts, if paid, were paid without authority; and that these being deducted will leave a balance due to the complainant. And he insists

that, under the circumstances, a court of equity will give him relief by a decree for such balance. This ground of objection raises several questions: 1. The first is a question of fact. Were these debts paid with the consent or approbation of the complainant? It is not positively proved that the complainant gave a written or verbal authority in every case; yet there is sufficient proof to satisfy the court that there was an understanding between the parties as to the payment of the debts; and if the debts paid were just debts, it is the opinion of the court that they ought to be allowed as credits in the account. It is objected that there should be proof on the part of the defendant as to the existence of the debts prior to their payment; that the complainant cannot prove their non-existence, and that the *onus probandi* is on the defendant. This objection is not sufficient. If difficulty of proof exists, it is from the complainant's own act in prosecuting his claim in a court of equity. It might indeed have been necessary for him to come into this court for a discovery and to obtain an account to enable him to recover at law. But after an account he might have proceeded at law, and there the *onus probandi* as to the existence of the debts and payments would have been on the defendant. The complainant has chosen to proceed to a final decree in this court, and the difficulty is one of his own creating. There can be no surprise upon the complainant in this case. The exceptions to the accounts put the matter in issue. It is not necessary to consider precisely how far the account is to be taken as evidence, but being made under oath, in answer to the prayer of the bill, it must have some effect as evidence with respect to matters about which there is no proof to the contrary.

2. But further, with reference to the allowance of the debts, there is another question. Is proof of the complainant's authority for their payment by the defendant necessary? Suppose it to be the case of purchase-money, two thousand dollars, payable in five installments, without any stipulations as to how it should be paid. Then the broad question would be, what is payment? Would it include only debts paid by order of the complainant, or would it not in equity extend to any debt actually due from the complainant and paid by the defendant? It is sufficient to say that the complainant, having come into this court for its aid, must do equity. And if debts due from him have been paid, he will be required, in seeking relief here, to allow such payments. This court will deal with the case upon equitable principles. If the complainant insists upon his

strict legal rights under the articles of agreement, his remedy is in a court of law. Under this view, his bill, on this part of the case, ought to be dismissed for a want of equity.

Second. The next objection to the account has respect to the interest. The complainant seeks to charge the defendant with interest from the date of the articles. This claim is not made on the ground of the written contract, for the terms of the contract do not warrant it. Nor does the complainant's counsel dispute the general rule of law, for which authorities were cited and which to my knowledge has been established law in Delaware for fifty years, that interest can be demanded only from the time mentioned in the agreement. The interest is claimed to run from the date of the articles, on the ground that the parties so intended, but omitted to insert a provision to that effect in the contract. There is an entire failure of proof on this point. Even if there had been such proof, it would have been necessary to consider whether parol testimony could be admissible for such a purpose. But the interest is claimed on the further distinct ground that after the sale and before the purchase-money was paid, the vendor permitted the purchaser to take possession of the land, which, it is insisted, implies an agreement on the part of the purchaser to pay interest. I have examined and considered the authorities cited to this point, and am of opinion that they do not apply to such a case as this. I know of no rule or principle of law out of which such an obligation could arise. It would be against reason and common sense. The reason assigned for such an obligation is, that the purchaser cannot compel a conveyance until he pays all the purchase-money; and, therefore, if he gets possession, it is a consideration for which he ought to pay interest. This position assumes what is not true in fact. The contract is that the complainant shall convey "at the reasonable request" of the defendant. This the law considers to be forthwith or immediately. The conduct of the parties, by the execution of a deed in 1824, before the purchase-money had been all paid, is evidence that they understood such to be the nature of the contract.

Again, the ground taken rests upon what is not true as a principle of law, viz.: that the obtaining possession is a consideration which creates an equitable obligation to pay interest. Consider the nature and effect of the contract. The defendant became the owner. He had the equitable title. The complainant, if he retained the title, would have been a trustee for the defendant and accountable to him for the profits. It is too

absurd a principle to be admitted, and is contrary to equity, that if the defendant took possession of his own property, which it was lawful for him to do, that such an act should make him liable to pay a larger sum for the land than he had agreed to pay; that the legal effect of doing a lawful act of exercising a right by possessing himself of his own property, should make the defendant liable to pay interest beyond and in contradiction to the express terms of the written contract. I am of opinion that the claim for interest cannot be sustained.

The exceptions to the account must be overruled and the bill dismissed with costs.

THE VOLUNTARY PAYMENT BY THE DEFENDANT of the debts of the complainant would not ordinarily entitle the defendant to set off such payment: *Waterman on Set-off*, sec. 413.

HOUSTON v. TOWNSEND.

[1 DELAWARE CH. 416.]

PAYMENT OF THE PURCHASE-MONEY, or a part thereof, will be considered a performance to take a parol contract for the sale of land out of the statute of frauds; and whenever the non-performance by the vendor would be a fraud upon the vendee, such contract will be specifically enforced. But such payment must be clearly made in execution of the contract.

PART PERFORMANCE MAY BE PROVED, generally by parol; but the payment of money being an equivocal act, the fact that it was paid in execution of the contract must either be admitted or proved by writing.

THE TERMS OF THE CONTRACT may be proved by parol, the fact of a part performance having been first established.

BILL for a specific performance of a parol contract for the sale of land. Complainant alleged that the defendant agreed to convey to complainant a half interest in certain lands which the defendant was about to receive from the estate of his father, then deceased, that in consideration thereof complainant agreed to pay defendant the sum of three thousand seven hundred and fifty dollars by conveying to him a half interest in the schooner *Tanner*, by paying half the amount due from the estate of the father to the Farmers' Bank of Delaware, and by paying the residue on the execution of the deed; that complainant had paid one thousand four hundred dollars, and had conveyed the half interest in the schooner to the defendant; that complainant had tendered one thousand seven hundred and twenty-five dollars, the residue of the sum agreed to be

paid, and had demanded a deed for the lands, but that the defendant refused to accept the one thousand seven hundred and twenty-five dollars or to give the deed. The bill prayed a discovery, a decree of specific performance, an accounting of the rents and profits, and for general relief. The answer admitted that some negotiations for the sale of the land had been entered into by the parties, pending which one thousand four hundred dollars had been paid, but averred that no contract for the sale was in fact ever made, the parties not being able to agree upon the terms; and offered to return the one thousand four hundred dollars. The case was set for hearing, and much evidence introduced, the material portion of which appears from the opinion.

C. S. Layton, for the complainant.

E. D. Cullen, *contra*.

JOHNS, Jr., Chancellor. The decision of this case appears to me to depend on two questions: 1. Whether there has been a part performance; 2. If there has, then whether the terms of the parol contract as set forth in the bill are clearly proved.

1. As to the first question, it is now settled that equity does decide upon equitable grounds, in contradiction to the positive enactment of the statute of frauds, and, in cases of part performance, will admit parol testimony to prove the terms of a parol contract relative to land: *Hovenden*, tit. Spec. Perf. 1, 2. The ground of equitable interposition is the prevention of fraud: *Vide Foxcraft v. Lister*, Colles Parl. Cas. 108; *Jeremy's Equity*, 437; 2 Atk. 100; 1 Br. Ch. 417; 1 Swanst. 181; 7 Ves. jun. 341; 3 Id. 39-40 and note; *Parkhurst v. Van Courtland*, 14 Johns. 15 [7 Am. Dec. 427]. Whether payment of part of the purchase-money is such a part performance as takes the case out of the statute appears to be an unsettled point, and the decisions are contradictory: 1 Madd. C. P. 379; Sugd. Vend. 81-85. The early decisions upon the subject are: *Lord Pengal v. Ross*, 2 Eq. Ca. Ab. 46; *Seagood v. Meale*, Prec. in Chan. 560; *Luke v. Morris*, 6 Ch. Ca. 135. These are generally cited as authorities to the point that it will not, but I would remark with respect to them that they are adverted to in subsequent decisions as cases in which only a small sum was paid as earnest, and in 3 Atk. 1; 3 Ves. jun. 37; 4 Id. 720, it is held that part payment of the purchase-money does take the case out of the statute upon the principle of part performance. These decisions have been objected to as extrajudicial by Sug-

den, and as being nothing more than *dicta*. He refers to one made by Lord Redesdale as conclusive: 1 Sch. & Lef. 41. Upon looking into this case it appears to me the contract was in writing, "the sum paid was in the agreement stated to be a deposit and interest to be paid if possession not delivered," and the plaintiff seeking a specific performance of this written contract which was under seal, attempted to supply by parol proof one of the terms alleged to have been omitted. It is true, in this case Lord Redesdale does take up the question whether part payment is part performance, and reasoning upon the case before him and its circumstances, concludes therefrom, and also from the peculiar phraseology of the English statute of frauds, that part payment of purchase-money does not take the case out of the statute of frauds, for he says the great reason as I think why part payment does not take such agreements out of the statute is, that the statute has said that in another case, viz.: with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because, it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands. As this distinction does not exist in our act of assembly about contracts and assumptions, which is the act relied on by the defendant in this case, it may be questioned whether Lord Redesdale's opinion can have any influence, especially as his reason does not apply.

So far as I have been able to trace the question in the American decisions, upon the point of part payment, they accord with the decisions and *dicta* of Lord Hardwicke and Lord Rosslyn. In the case of *Wetmore v. White*, 2 Cai. Cas. [2 Am. Dec. 323], Thompson, J., in delivering the opinion of the court, says expressly that payment of the consideration-money had always been held as a part performance. Judge Reeves, under the title "*Powers of Chancery*," in his treatise on Domestic Relations, has, after stating the conflicting decisions on this point, remarked, in his peculiar manner: "That if it be no fraud to receive another's money on the footing of a parol agreement, and then to refuse the fulfillment of the agreement, then in the cases in Prec. in Chan., Eq. Cas. Ab., and Sch. & Lef., are correct, supposing the governing principle of the interference of chancery was to prevent fraud; but if it be fraud so to do, then they are incorrect, and the cases in Vern., 3 Atk., and 4 Ves. jun. are correct, which proceed on the ground that the

prevention of fraud was the reason why they were supposed not to be within the statute." Washington, J., in the case of *Thompson v. Tbdd*, 1 Peter's Cr. C. 388, says: "Although it should be admitted that, under all the circumstances of this case, payment of a part of the purchase-money will amount to a part performance, still it should appear, beyond all reasonable doubt, that the payment was understood by the parties to have been so made and intended." This opinion of Washington, J., accorded with the principles laid down in *Powel on Contracts*, and 1 *Bac. Ab.* 74, tit. Agreement. I will refer to what is said by Bacon on the subject of part performance, as it recognizes essential principles and states the rule of evidence with respect to the payment of purchase-money. Under the title of Agreement, vol. 1, 73, Bacon says: "There are several cases in which it has been held that a parol agreement in part executed, shall be performed in the whole; but as those cases are not exactly stated or well reported, it will be sufficient to mention what seems to be the sense of them, and what with any justness can be collected from them, that if an agreement be made concerning lands, though not in writing, and the party by whom it was made receives all or part of the money, equity will compel a specific performance of the whole agreement; because this is out of the statute, which designed to defeat such agreements only no part whereof were carried into execution, and set up merely by parol; for that was the occasion of frauds and perjuries, that persons used to impose verbal agreements upon others, and by such false oaths charge the parties in equity to perform such agreements, though they had never been made; and therefore the mere parol proof of such agreements concerning lands cannot be admitted in a court of equity; but where the price is paid, there it doth not stand upon the parol proof of the agreement only, but upon the execution of part of the agreement, which is evidence that the agreement was really made; and therefore there is the same reason that the plaintiff in equity should have the land for his money, as it is that he should deliver the goods where he has received the money; but the doubt in these cases is what shall be a proof of the receipt of the money.

"Thus far it seems certain, that if the defendant in his answer confesseth the receipt of the money for that purpose in the bill, or if he denies the money, and it be proved upon him by writing, as by letter under his hand, or other written evidence, he shall be obliged specifically to perform the whole agreement,

because he hath carried part into execution, but if the defendant confesses the receipt of the money, but says that he borrowed it from the plaintiff, and that he had it not in execution of that agreement, there he turns the proof of the agreement upon the plaintiff, and then the plaintiff must prove the receipt of the money by the defendant for the purpose in the bill, by some written agreement," for parol evidence as to the receipt of the money seems to be as much excluded by the statute as parol evidence relating to the agreement.

From the investigation of the several decisions, I come to the conclusion, that there may be cases in which payment of the whole, or part of the purchase-money, will amount to performance of a parol contract concerning lands, and whenever the non-performance on the part of the vendor after receiving the purchase-money, or a part thereof, would put the party into a situation that is a fraud upon him, unless the agreement is performed, the court upon the principle of preventing fraud should decree a specific performance, provided the terms of the agreement can be satisfactorily ascertained, that is, the agreement as set forth in the bill. The act relied as part performance should be such as would not have been done independent of some contract or agreement relative to land; because, as you are from the act performed to infer a contract, it must therefore be an act of that description which will not admit any other inference. I would further remark, that the act must, to a certain extent, be a joint act, or such as clearly indicates mutual assent. Thus, entering into the possession of lands as owner, and with the consent of the vendor, has uniformly been considered and admitted to be part performance, and being evidence *per se* of an agreement for and concerning the land, the party seeking specific performance is permitted, by parol, to prove the terms. This act of the vendee, in entering upon the land and taking possession thereof as owner, with the assent of the vendor, is considered as in execution of an agreement, and therefore a part performance, but acts which are only preparatory, such as giving directions for conveyances, taking a view of the estate or putting a deed into the hands of a solicitor to prepare a conveyance, are not considered part performance: *Clerk v. Wright*, 1 Atk. 12; 6 Bro. Par. Cas. 45; 3 Bro. Ch. 400; 1 Madd. C. P. 381.

So, likewise, where there was a parol agreement for a compromise and a division of the estate by arbitration, acts done by the arbitrators towards the execution of their duty, such as surveying, etc., were not considered as acts of part perform-

ance: 6 Ves. jun. 41. And where there was a parol agreement for the purchase of a lease, and that upon the plaintiff procuring a release of right from a stranger, the defendant would convey, and the plaintiff procured the release for a valuable consideration, this was held not to be a part performance entitling the party to a specific performance: 2 Cox, 271. These cases, and particularly the last, clearly evince the principle, which is essential to constitute an act of part performance; the thing done must be as before stated, in execution of the contract, and not as preparatory or as inducement: See *Gevens v. Salder*, 2 Desaus, 190. Hence has arisen the difficulty with respect to the payment of money, not being such an act as of itself is conclusive; for it may have been made for a purpose different from that alleged; and if the party paying can prove by parol the fact of payment and the object, then it is apparent the door is open to perjury and fraud; and the statute would be rendered useless and its provisions defeated. This has no doubt given rise to the opinion that the payment of money, either in part by way of earnest, or in full, for the purchase, is not a part performance. If the fact is to be established by parol, then I should consider the opinion to be well founded; but if the fact of payment is connected with the concurrent act of the vendor receiving and appropriating the money paid as purchase-money; and this appears, either by the defendant in his answer confessing the receipt of the money for that purpose, as charged in the bill; or if denied, it be proved upon him, by writing, as by letter under his hand, or other written evidence; or, if the defendant confesses the receipt of the money, but says he borrowed it from plaintiff, and had it not in execution of the agreement, then if the plaintiff proves the receipt of the money by the defendant, for the purpose alleged, by some written agreement; in all such cases, and upon every principle, it seems to me, that such a fact thus appearing, would be conclusive evidence of an existing agreement of which it was part performance, and which the defendant having carried part into execution, should be compelled specifically to perform the whole.

In the case now under consideration, the complainant in his bill has charged the payments as made on account of the purchase-money in execution of the agreement set forth. The defendant, in his answer, admits the receipt of the money, as an advance pending the treaty for sale; but denies that said advances were a part performance of an agreement to sell and convey the said real estate, or any part thereof, to complainant.

and also admits the two receipts. As the answer here admits the receipt of the money, and denies that it was in part performance, we must recur to the receipts of March 10, 1832, and April 17, 1832, which are admitted by the defendant, and proved by the witnesses, to be signed by him. These receipts unequivocally establish the fact of part payment, to the amount of one thousand four hundred dollars, nearly one half the purchase-money, as set forth by the complainant in his bill. The defendant has also admitted the proceedings in the orphan's court, relative to the acceptance; and has not denied the matter stated by the complainant as to the inducement for his entering as surety in the recognizance.

The equity of the complainant, as thus presented, is strong; and a case could not occur more in accordance with the rule as laid down by Bacon, than that which appears from the two receipts. The defendant by the first receipt, dated March 10, 1832, has not only acknowledged the receipt of eight hundred dollars, but also says "which is in part pay of the mill property in Middleford, which I promise to deed when called on." The proceedings in the orphan's court of the same date show the property and the acceptance by the defendant, and fix the quantity. Thus the subject-matter of the parol contract, and to which the receipts refer by name as the mill property in Middleford is ascertained; a moiety of which the defendant by said receipt declared he had sold to complainant; and by the acceptance it is proved to be two thirds of the residue of the Middleford property, which defendant accepted at the valuation, a moiety or half part of which he sold to the complainant. This is a question which, as it relates to the terms of the contract, will be hereafter considered, and properly belongs to the second question to which I will now advert; and under the circumstances of the case, being of opinion that the payments on account of the purchase-money, made and proved as aforesaid, are such acts as amount to part performance, I will now take up the second question, viz., whether from the testimony in the case, the terms of the agreement set forth in the bill are clearly proved.

2. It being the settled rule of the court of chancery that where a contract relating to an interest in lands has been executed by one party, or carried partly into execution, it may be proved by parol evidence, and specific performance decreed, in order that one side may take advantage of the statute, to be guilty of fraud: 1 Ves. sen., 221, 291; 2 Johns. 221, 573, 587; 1 Serg. & R. 80; 5 Day. 16; *Parkhurst v. Van Courlandt*. 14

Johns. 15 [7 Am. Dec. 427]; and as I was of opinion that the part payment of the purchase-money is a part performance of the contract set forth in the bill, the next consideration is whether that contract is made out by clear and satisfactory proof. Upon this subject, Sugden in his Treatise on Vendors, 86, remarks: "It may happen that although an agreement be in part performed, yet the court may not be able to ascertain the terms, and then it seems the case will not be taken out of the statute. If, however, the terms be made out satisfactorily to the court, contrariety of evidence is not material: 1 Ves. sen. 221; and the court will use its utmost endeavors to get at the terms of the agreement: 2 Ves. jun. 243; 2 Sch. & Lef. 1; 5 Vin. Ab. 523, Pl. 40; Id. 522, Pl. 38; 6 Ves. jun. 470; 3 Br. Ch. 139; 1 Sch. & Lef. 22. In *Boardman v. Mostyn*, 6 Ves. jun. 470, Lord Eldon says: "Perhaps if it was *res integra*, the soundest rule would be that if the party leaves it so uncertain, the agreement is not taken out of the statute sufficiently to be enforced; but in all the cases in equity, the court has at least endeavored to collect, if it could, what were the terms the parties have referred to." Sugden on Vendors, 89, after stating a case lately decided by Lord Mannors, and remarking that great reluctance had been manifested in carrying parol agreements into execution on the ground of part performance, where the terms do not distinctly appear, observes that notwithstanding the case decided by Lord Mannors, there appears to be abundant authority to prove that the mere circumstance of the terms not appearing, or being controverted by the parties, will not of itself deter the court from taking the best measures to ascertain the real terms. And Sugden further remarks, that it can rarely happen that an agreement cannot be distinctly proved where the estate is absolutely sold. Most of the cases on this head have arisen on leases, where the covenants, etc., are left open to future consideration. If, from the testimony, it is difficult to ascertain the terms of the agreement, the court, to remove all doubts, may direct an issue.

Hence, in the case now before the court, if I am correct in the opinion I have expressed on the first point as to part performance, then it would be incumbent on the court to ascertain the terms of the contract; or, if this could not be done, to direct an issue as to such facts as may not be clearly proved or established. The only fact about which there can be a doubt in the present case, is the price. The subject-matter of the contract, and the quantity thereof sold and for which the de-

defendant promised to give a deed on demand, I consider settled beyond all controversy, by the receipts signed by defendant and bearing date March 10, 1832, and April 17, 1832; and their operation and extent are fully and unequivocally ascertained, when taken in connection with the proceedings relative to the acceptance of said real property by defendant in the orphans' court of Sussex county, and with the testimony of Boyce and Elligood, the defendant having by the acceptance acquired a title to two thirds of the real estate of his father, Thomas Townsend, deceased, described as the mill property in Middleford; also, by the receipts dated March 10 and April 17, 1832, defendant acknowledges to have received the sums mentioned in the first receipt in part pay of the half of the mill property in Middleford, which he promised to deed when called on; by the second receipt he says, "in part pay of the one half of the Middleford property which I have sold him." Thus much appearing to the court by these receipts, which are proved in the cause, and not even denied, except evasively, as to their import, in the answer, I shall proceed to the inquiry whether the testimony satisfactorily establishes what was the consideration agreed upon.

The complainant in his bill sets forth the consideration, and alleges the same to be three thousand seven hundred and fifty dollars; and then proceeds to state the manner in which it was agreed he was to pay the same to defendant. The defendant, in his answer, denies that any sum ever had been in fact agreed upon. The answer thus positively denying the fact, unless the same is established, either by the testimony of two witnesses or of one corroborated by circumstances, the denial in the answer must be conclusive. As this is one of the essential terms of an agreement, and necessary to be ascertained, I will advert to the testimony.

The first witness on the part of the complainant, the defendant not having taken any testimony, is Capt. Boyce, who in his deposition states, "that the defendant, in the month of April or May, 1832, informed him he had sold half of the Middleford mills and property to complainant, and purchased the schooner Tanner and scow from him for six hundred and twenty-five dollars; price of real property not stated; that he could have got more for said property than he had agreed to let Robert Houston, complainant, have it for." Now, it does appear, that although no price was stated by the witness, yet his testimony proves two facts, viz.: that the defendant had sold half of said

property to the complainant, and for a consideration agreed upon between the plaintiff and defendant; because the defendant, in stating to the witness that he had sold, had he nothing more, would have afforded strong ground of presumption; but when he goes on to state that he could have got more for said property than he had agreed to let Robert Houston have it for, he thereby unequivocally refers to a fixed price, settled and agreed upon between the parties; otherwise, how could he with any propriety say he could have got more for said property? The admission of the defendant, as proved by witnesses, is therefore at variance with that part of his answer which denies that any price, or sum, or terms, were agreed upon or fixed between complainant and defendant for the purchase of the said real estate by the complainant; hence, unless the testimony of Capt. Boyce is either sustained by another witness, or corroborating circumstances, it cannot prevail against the positive denial of the defendant, which is made under oath. But it does further appear, from the deposition of J. A. Elligood, that some time in the spring of 1833, at the time when complainant tendered the alleged balance of the purchase-money, the defendant, in presence of Elligood, in replying to what complainant stated to be the contract or agreement, admitted, "that he had heretofore agreed to convey said property to him, for the amount mentioned, but that it would be unjust that he should convey for that sum, being one half of the valuation money."

From the testimony of these two witnesses, both unimpeached and not controverted, except by the denial in the answer, it does appear that the parties had agreed upon the price or sum constituting the consideration, and from Elligood's testimony the sum is ascertained to be half the valuation, and is thus rendered certain, because *id certum est, quod reddi certum potest*, and by referring to the record of the orphans' court, which is evidence in this cause, the one half of the valuation appears to be the sum of three thousand seven hundred and fifty dollars, as alleged in complainant's bill.

In considering the testimony in relation to this point, as to the sum or price having been fixed or agreed upon by the parties, the deposition of Noonan in connection with the answer, at first view, appeared to present some uncertainty whether the sum fixed or agreed upon was the half of the valuation, or half what the property cost defendant; and whether under the term half what the property cost, could be included the half of

other expenses, relative to the procuring the act of assembly, etc., they being properly a charge against the fund generally. But the deposition of this witness has relation to declarations of Townsend as to what he intended to do, and not, like the others, of what he had done. The subsequent information of Townsend, that there was a misunderstanding between him and Houston, does not disclose the cause, only that it was about the purchase of the Middleford property. From the declarations of Houston to Noonan, it does appear that it related to the extra expenses, which, it appears, were never adjusted, although he seems to have been willing to pay his fair proportion. From the declarations, and the occasion when they were made, both before Noonan and Elligood, I am induced to believe this difficulty about extra expenses originated after the defendant had refused to perform the agreement.

I am led to this opinion by the import of defendant's letter addressed to complainant, dated April 26, 1832. In this letter the defendant attributes the interruption of the business to some unpleasant circumstance, which he was to communicate to the complainant when he should see him; and evidently attributes the non-compliance on his part to the interposition of some people, "who," he says, "made themselves very busy, and who knew well when to stop it," etc. If the real difficulty had been a misunderstanding about extra expense, would it not have been disclosed in this letter of the twenty-sixth of April? Why intimate that he was compelled to relate a circumstance that was very disagreeable to him? Surely, if the other had been the difficulty, it could have been stated with propriety, without occasioning any unpleasant feeling, such as the letter implies; nor could such a matter be in any way referred to the interposition of other people. This letter of the twenty-sixth of April, written a few days after Houston had paid the defendant six hundred dollars, evidently discloses that the writer was by no means satisfied with the course he was then adopting. He had by the money and credit of the complainant, after discharging the debts against his deceased father's estate, been enabled to accept the two thirds thereof at the valuation reduced more than one half by the amount of incumbrances and debts paid off; and, in the course of the proceeding, as appears from the records of the orphan's court, had the benefit of the complainant's credit, as one of his sureties in the recognizance, a liability yet subsisting.

From all these circumstances appearing in the cause, it is

evident the defendant availed himself of the full benefit of the agreement, so far as the same had been performed by Houston, and did not make known his determination not to comply with the same on his part until he had obtained all the advantage he expected to derive from it. Upon the ground, therefore, that under the circumstances of this case it would be a fraud upon the complainant if a specific performance were refused, I am of opinion the complainant is entitled to relief; but, before the same can be granted, it is necessary to direct an account of the rents and profits of the one half of the two thirds of the real estate for which the defendant, by the receipt dated March 10, 1832, promised to give to complainant a deed on demand. And as equity considers as done that which is agreed to be done, I regard the right of the complainant to the one half of the two thirds of the said real estate as a perfect and subsisting title in equity from the date of the aforesaid receipt; that it carried with it the right to the rents and profits, and entitled the defendant from that time to the balance of the purchase-money, with interest, subject to deductions for such payments as might be clearly proved to have been made; all which, when the rents and profits shall be accounted for under an interlocutory order, will be adjusted, and the balance due on account of the purchase-money being thus ascertained, then the court will be able to make a final decree in the cause. Interlocutory decree for an account.

PAYMENT OF THE PURCHASE PRICE, in whole or in part, is not of itself sufficient, according to the decided preponderance of the authorities, to take a parol contract for the sale of lands out of the statute of frauds: *Cronk v. Trumble*, 66 Ill. 428; *Thompson v. Gould*, 20 Pick. 134; *Eaton v. Whitaker*, 18 Conn. 222; *Purcell v. Miner*, 4 Wall. 512; *Cuppy v. Hixon*, 29 Ind. 522; *Wood v. Jones*, 35 Tex. 64; *Kidder v. Barr*, 35 N. H. 235; *Pomeroy on Contracts*, sec. 112.

PAYMENT, TOGETHER WITH OTHER ACTS, such as the delivery of possession of the land, making improvements, and the like, will operate as a part performance, and entitle the party performing to specific execution of his contract: *Eaton v. Whitaker*, 18 Conn. 222; *Kidder v. Barr*, 35 N. H. 235; *Pomeroy on Contracts*, sec. 114. Mr. Justice Grier, in *Purcell v. Miner*, 4 Wall. 517, delivering the opinion of the court in regard to a parol contract concerning land sought to be specifically enforced, laid down the following rules: "He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for him and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory and indubitable proof: First. Of the contract and of its terms. Such proof must be clear, definite and conclusive, and must show a contract leaving no *jus deliberandi*, or *locus penitentiae*. It cannot be made out by mere hearsay, or evidence of the declarations of a party

to mere strangers to the transaction in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated; testimony, therefore, impossible to be contradicted. Second. That the consideration has been paid or tendered. But the mere payment of the price, in part or in whole, will not of itself be sufficient for the interference of a court of equity, the party having a sufficient remedy at law to recover back the money. Third. Such a part performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law. Fourth. That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession."

LOCKWOOD v. BATES.

[1 DELAWARE CH. 435.]

GRANTING A REHEARING IN EQUITY does not *per se* vacate the decree, but simply opens it for reversal, alteration or correction; and if no rehearing be had either by reason of the dismissal of the order, or by the agreement of the parties duly entered, the original decree stands as if no order for a rehearing had been granted.

AN AGREEMENT TO EXONERATE THE SURETIES on a recognizance, entered into by the defendant in a writ of *ne exeat*, upon their paying part of the decree, does not prejudice the rights of the plaintiff against the defeniant.

SET-OFF IN EQUITY. — Mutual credits are a ground of set-off in equity, though not at law. Hence a decree in favor of the plaintiff seeking a partnership account may be set off against a judgment at law in favor of the defendant in the decree and against the plaintiff. And this right of set-off is not affected by the fact that, by the decree, balances were made payable to other partners also, provided, the partners are entitled severally under the decree.

THE EQUITABLE ASSIGNEE OF A JUDGMENT, for value, and without notice of existing equities in favor of the judgment-debtor, takes it subject to such equities accruing before notice of the assignment. Therefore, such an assignment is subject to the debtor's right to set off a debt due from the judgment-creditor under a decree in equity, made before notice of the assignment, or made afterwards, but entered *nunc pro tunc* as of a date prior to the notice.

AN ASSIGNMENT TO SECURE A PRE-EXISTING DEBT does not give the assignee the equities of a purchaser for value.

LES PENDENS IS CONSTRUCTIVE NOTICE to purchasers of all equities arising out of the subject of litigation. Accordingly, under an assignment of a judgment pending a suit resulting in a decree in favor of the judgment-debtor against the creditor for the payment of a balance due from him as a co-partner, the assignee is affected with constructive notice of the debtor's right to set off such decree against the judgment; and if the assignee was a solicitor in the suit in equity, he is held to have actual notice of such right.

BILL to obtain the benefit of a set-off of a certain decree in equity in favor of Samuel Lockwood, the complainant, against one John Mitchell, against a judgment obtained by Mitchell against Lockwood and assigned to Martin W. Bates, now defendant in trust for the other defendants.

The facts were in substance as follows: The suit in which the said decree was made, was begun by the complainant and others, partners in the firm of Mitchell, Lockwood & Co., to obtain a settlement of the partnership affairs, by John Mitchell, the active partner. The final hearing was in August, 1823, and the chancellor announced his opinion in February, 1826. Mitchell having died since the hearing, the chancellor, at February term, 1826, on petition of the parties interested, ordered a final decree entered, *nunc pro tunc* as of August 8, 1825. The decree, which is set out in the opinion of Johns, Chancellor, directed, among other things, the payment of one thousand eight hundred and eighteen dollars and forty-five cents by Mitchell to Lockwood, as the balance due him on a settlement of the partnership affairs. A petition for a rehearing was filed in April, 1826, and granted February 22, 1827; but on July 9, 1827, by agreement of the parties, the order for a rehearing was discharged, and the decree "made firm and stable forever." It appeared, that pending the suit, a writ of *ne exeat* was granted against Mitchell, and he entered into a recognizance for the payment of such sums as should be found due on the account; but afterwards the complainants in the suit agreed with the sureties in the recognizance, to discharge them from further liability upon the payment of one thousand dollars, which they subsequently paid.

The judgment against which the complainant wished to set off the sum due him under said decree, was obtained by Mitchell against Lockwood on a bond debt on January 9, 1819; which judgment was on December 8, 1824, assigned by Mitchell to Bates, defendant herein, in trust for the payment of certain creditors of Mitchell, who are also defendants, Bates being at the time a solicitor in the partnership suit. Lockwood received notice of the assignment November 5, 1825. The balance due on the judgment exceeded the amount due the complainant under the decree. Other facts are stated in the opinion of the chancellor.

The defenses relied upon in the answer were: 1. That the rights of Lockwood's creditors under the assignment could not be affected by the decree which was subsequent to the assign-

ment; 2. That Mitchell's liability under the decree was discharged by the agreement made with the sureties in the recognizance under the writ of *ne exeat*; 3. That the decree was vacated by the order granting the rehearing in February, 1827, and was not re-established by the subsequent order setting aside the rehearing; and, 4. That the assignee not being a party to the partnership suit ought not to be affected by it.

Frame, for the complainant.

E. D. Cullen and M. W. Bates, for the defendants.

JOHNS, Jr., Chancellor. In considering this case I have reversed the order in which the several grounds of defense are presented, and shall examine the last two before adverting to the question of set-off.

1. The effect of the order granting a rehearing does not *per se* vacate the original decree. It only opens it either for reversal, alteration or correction; and if the rehearing does not take place, and the order should be dismissed, the original decree stands precisely as if no such order had been granted. The parties having, by their agreement entered on the chancery docket, discharged the order for rehearing, it must be presumed to have been done under the sanction and approbation of the chancellor. The rehearing not having taken place, no action of the chancellor was or could be necessary to give validity to the original and final decree, which, upon the discharge of the order for rehearing, became firm and stable, independent of any agreement of the parties to that effect. The additional objection, viz.: that the assignee, not being a party, should not be prejudiced, as he had no notice, will hereafter be considered, when I shall advert to the decisions in relation to purchasers *pendente lite*.

2. The next ground of defense is that of compromise, under which it is insisted that the recognizance was satisfied and the order for rehearing discharged. This, it has been contended, satisfied the decree; and, therefore, the complainant has no further interest or claim under it. In considering this ground, which has been much relied on by the defendants, even supposing it to be true, it appears doubtful whether a defendant can take advantage of it in his answer, and whether it is not matter which must be relied on by plea. In 2 Chit. Eq. Dig. 816, it is said, "a defense of compromise or release is not proper for answer; it is available by way of plea only." *Leonard v. Leonard*, 1 Ball. & B., 323. But considering it as properly em

braced within the answer, the whole question is covered by the written agreement. No proof has been offered of any compromise, and the agreement must speak for itself. If we advert to it, it will appear, by an express provision contained in the agreement, that the parties were not to be thereby precluded from any remedy they might have against Mitchell. They bound themselves not to proceed on the recognizance against the sureties, on condition of their paying one thousand dollars. This sum being afterwards paid, the receipt thereupon given must be considered in accordance therewith, and cannot be understood so as to contradict the written agreement of the parties. The recognizance taken under the writ of *ne exeat*, was no more than a security for the performance of the decree; and it was competent for the parties in whose favor it was taken to discharge the same, so far as the sureties were liable, without prejudice to their claims against their principal debtor under the decree. It amounted to no more than an abandonment of the security they had obtained under the writ of *ne exeat*, and left them to their usual remedies under the decree itself. The argument founded upon the agreement discharging the order for a rehearing, by which, as it has been contended, a compromise must have taken place, when extended beyond the sureties, is inconsistent with the record entry. For, if it had been the intention of the parties to discharge the principal debtor, why did they declare that the original decree should remain firm and stable forever.

3. The remaining question in this case, the one which appears to be the most material and important, relates to the matter of set-off. Before considering this, it will be necessary to state accurately the dates of the final hearing of the cause, the decree, the assignment and notice thereof. It appears the final hearing of the cause in chancery was in August, 1823, previous to which the account had been filed and excepted to; and at the August term, 1823, the same was fully heard, and the chancellor held the same under consideration, for the purpose of making his final decree. The assignment of the judgment was made in December, 1824, and as appears from the agreement filed in this cause, notice of the assignment was not given to the debtor until November, 1825.

In February, 1826, on petition, the chancellor made his final decree, which he ordered to be entered as of the last term, viz.: the August term, 1825. The decree is in the following words: "This cause having come on to be heard on the eleventh day of August, A. D. 1823, and the bill, answer, account filed, and

the exceptions thereto, and the proofs and allegations of the parties being read and heard, and the same debated by counsel learned in the law on both sides; and the chancellor having taken time to consider the same, and the said Samuel Lockwood, Armwell Long, and Walter Douglass, administrator of James Clayton, deceased, having at this term presented their petition to the chancellor, stating that the said John Mitchell heretofore moved into the state of Maryland, and hath died there since the last term, and praying that the decree of the chancellor may be made and signed *nunc pro tunc*; and it being ordered by the chancellor, this twenty-second day of February, A. D. 1826, that the final decree in this cause should be enrolled and signed as of the last term of this court, to wit., as having been made and rendered the eighth day of August, 1825. The chancellor doth now, this twenty-fourth day of February, A. D. 1826, order, adjudge, and decree, as of the said last term of this court; to wit., as of the said eighth day of August, 1825, that the said John Mitchell, the defendant in this cause, shall pay to Armwell Long, one of the complainants in this cause, the sum of one thousand four hundred and sixty-eight dollars and twenty-three cents; that he shall likewise pay to Samuel Lockwood, another of the complainants in this cause, the sum of one thousand eight hundred and eighteen dollars and ninety-five and one fourth cents; and that he shall further pay to the said Walter Douglass, administrator of the said James Clayton, deceased, the sum of one thousand seven hundred and six dollars and sixty-one cents; and that the said complainants recover their respective costs in this suit from the said John Mitchell."

As this question of set-off is to be considered with reference to the rights of the assignee, it may be well first to examine what would have been the condition of the obligee, had no assignment taken place. This will present the general question, whether Lockwood, under this decree, could have availed himself of the sum decreed to be due and payable to him, as a set-off against the judgment held by Mitchell against him for a separate debt. At law, partners cannot maintain an action against each other, unless it be an action of account, until they have settled their accounts, or until a final balance is struck. In *Fromont v. Coupland*, 9 Eng. Com. Law Rep. 366, Best, C. J., says: "If, after a partnership has been dissolved, the parties adjust a balance, and one of them makes a promise to pay, there arises on that a moral consideration which may be the subject of an action. The case in Holt goes, perhaps, some-

what further than this. However, it is enough to say that the opinion of Buller, J., in *Smith v. Barrow*, is decisive of the present case. He there says one partner cannot recover a sum of money received by the other, unless, on a balance struck, that sum be found due to him alone. So that before there can be an action or a set-off in respect of a claim arising out of a partnership account, there must be a final balance struck. The same doctrine is laid down in *Foster v. Allanson*, 2 T. R. 479. It has been contended that a balance was struck in the present case. But I think not. A balance during the continuance of the concern will not do. It must be a final balance of all the partnership accounts. There has been nothing like that here; and we might be doing great injustice if we were to allow the set-off. The balance in question was only upon a weekly account; and upon an annual or final account the result might have been different. Upon the balance thus struck no action could have been maintained; and unless an action could have been maintained, the set-off cannot be allowed." Park and Burrough, JJ., concurred.

This decision agrees with all other cases in principle, and determines the right of set-off between partners at law by the right of action. The right of set-off is dependent on the final settlement; and this result can only be obtained, either by the act of the partners, by a bill in chancery, or by the action of account. If, then, on dissolution of a partnership, the accounts between the partners are, on bill filed, finally settled and adjusted, and the balances respectively due ascertained and liquidated, and a sum certain, severally due and payable, decreed, it does appear that if the parties entitled should elect to proceed at law, each would, under the decree, have a distinct and separate right of action, and this upon the same principle on which they would have a right of action, in case the settlement had been made by the partners themselves. Hence, I conclude that, under this decree, Lockwood, for the amount due and payable to him from Mitchell, if he had elected to pursue a legal remedy, might have maintained his action of *assumpsit*; and if so, he being separately and in his own right entitled under the decree to receive a sum certain as due and payable to him from Mitchell, it is evident he would have a right to set off the same against a judgment due from him to Mitchell. It has been contended that the decree, being made in a cause where several are complainants, is similar to a joint judgment, and therefore cannot be set off against a judgment against one only

of the complainants. On this point it does appear that the character of the decree is misapprehended. The bill filed by the several partners against Mitchell, the acting partner, is not a suit instituted by the firm to recover a partnership debt. Its object was not to ascertain a sum due jointly, but the partnership being dissolved, it is the mode adopted by the different members interested in the joint concern to adjust and settle their individual interests, and to ascertain and recover what is due to each separately from Mitchell. If it had been a suit on behalf of the firm to recover a debt due the firm, then it would have been competent for either complainant under the decree to have received the whole, and to have given a discharge for the same. And, on the death of any one of the complainants, the survivors would have been entitled to the whole sum. It is the necessary result of a joint judgment, or of a joint interest under a decree, that the survivor is entitled. But how can the right of survivorship apply to the decree of 1825? By the express language of the decree, one thousand eight hundred and eighteen dollars and ninety-five cents is due and payable from Mitchell to Lockwood; and he could not pay the same, or any part thereof, to either of the complainants; nor could they give a discharge for it, or become entitled to it by survivorship. On Lockwood's death the right to receive it would have passed to his personal representatives as fully and absolutely as any other separate debt. The suit being a proceeding between partners, after dissolution of the firm, distinguishes it from the cases cited in the argument, which were decisions relative to the right of set-off as between third persons having separate demands against members of the firm and also indebted to the partnership. In all such cases it would be inconsistent with the doctrine of set-off to permit the separate debt to be deducted from the claim of the partnership, because, like the case of a joint judgment, it would be charging the joint interest with an individual debt.

Supposing, therefore, no assignment had been made as between Lockwood and Mitchell, the right to set off the amount due Lockwood under the decree, according to the principles of the decided cases, would clearly have existed. The sum was a debt due from Mitchell to Lockwood, and it was liquidated and certain. The next subject for consideration is the effect and operation of the assignment. It is admitted that the assignee takes subject to all the equity existing in the obligor, but the counsel for the defendant has insisted that the rule is limited to the equity existing at the time of the assignment. For the purpose

of understanding this part of the case it will be necessary to advert to the assignment and ascertain whether either the assignment, or the subject-matter thereof, is within any statutory provisions of this state. We have an act of assembly authorizing the assignment of bills and specialties: Dig. Del. Laws, 42. We have also statutory provisions for the assignment of judgments to sureties and to special bail, by whom the judgments have been paid. But the present case is not embraced within the provisions of any of the statutes, and I know of none other under which this assignee can derive the legal title. The peculiar character of this assignment requires to be particularly adverted to. It appears from the proof in the cause, that judgment was entered on the bond executed by Lockwood to Mitchell, under and by virtue of the warrant of attorney, and that afterwards the same was indorsed for the use of Levi Dukes; that in December, 1824, an extract from the record was obtained and an assignment made of the judgment to Martin W. Bates, for the purpose of paying a debt due from Mitchell to William Schlayter, of Philadelphia, and so much as might remain after paying the Schlayter debt, to be applied to a debt due from Mitchell together with Jacob Biddle, to Longstreth & Bailey, of Philadelphia. It appears that the indorsement under this assignment was not made on the record until the twenty-third of June, 1830, when it was marked for the use of M. W. Bates, as per assignment to him, dated the eighth of December, 1824, on an extract. By agreement of counsel filed in the cause, it is admitted that Samuel Lockwood on the fifth of November, 1825, had notice of the assignment of the judgment by Mitchell to Martin W. Bates. How far the rights of the debtor are involved or affected under the transfer, independently of legislative enactment on the subject, must depend upon the general rule relative to notice. This would fix the fifth of November, 1825, the date of the notice, as the time when the liability of the debtor to the assignee commenced.

The next inquiry relates to the effect and operation of the decree which, under the petition in February, 1826, was ordered by the chancellor to be entered and enrolled as of the eighth of August, 1825. And this presents for consideration the question whether the assignee of the judgment, having notice of the suit pending in chancery, having acted as solicitor in the cause, and being fully acquainted with the whole proceeding, including the final hearing in August, 1823, does not come within the rule of equity, as stated by Sir William Grant, master of the

rolls, in the case of *The Bishop of Winchester v. Paine*, 11 Ves. jun. 194, that "he who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title." That a *lis pendens* is, of itself, notice to the purchaser, is a rule well established: See 1 Johns. Ch. 577-578.

One of the ordinances of Lord Bacon, laid down for the better and more regular administration of justice in the court of chancery, was that "no decree bindeth any that cometh in *bona fide* by conveyance from the defendants before the bill exhibited, and is made no party, neither by bill nor order; but when he comes in, *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the land, there regularly the decree bindeth:" Lord Bacon's Works, vol. 4, p. 511. In the case of *Martin v. Stiles*, cited in 11 Ves. jun. 200, the bill was filed in 1640, and was abated by death in 1648; and a bill of revivor was filed in 1662; and the purchase was made in 1651; and yet, as the purchase was, by relation of the bill of revivor, made *pendente lite*, the purchaser was held bound, and by no less a judge than Lord Clarendon. When this case was afterwards, in a new shape, brought before Lord Keeper Bridgman, 1 Cas. in Ch. 150, he observed that it was not the form, but the substance of a decree, that all are bound who come in *pendente lite*. The case of *Culpeper v. Austin*, 2 Ch. Ca. 115, 221, is a strong determination on the same point. In that case, the testator had conveyed his lands to his executors in fee, to pay his debts; and after his death the defendant purchased the land of the executors for a valuable consideration. The heir brought his bill to have the land, on the ground that the lands were not wanted to pay debts; and the lord chancellor held that the suit pending between the heir and the trustee, to have an account, was sufficient notice in law, without actual notice of the suit; and that the party purchased at his peril; so that if, in the event of the suit, it appeared that the sale was unnecessary and improper, the heir would recover against the purchaser. It turned out afterwards that the defendant lost his purchase, though he had no actual notice of the suit, and though he had purchased and paid the same day the bill was exhibited. In 1 Ch. Ca. 301; Finch. Rep. 321, there were repurchases made by defendant for a valuable consideration, *pendente lite*; and for that reason the purchasers were decreed to reconvey, and deliver up the writings. Chancellor Kent, after reviewing the preceding cases,

declares the same general principle, that as to all persons who come in as purchasers, *pendente lite*, though they are no parties to the suit, they and their interests shall be bound and avoided by the decree; and this is laid down as the known law in several cases to be found in Vernon: *Preston v. Tubbin*, 1 Vern. 286; 1 Id. 318, 459; 2 Id. 216; see, also, 2 P. Wms. 482. This doctrine came frequently under the review of Lord Hardwicke, and he always held that a purchaser, *pendente lite*, was bound by the decree in the suit: 2 Atk. 174; 3 Id. 392. Lord Camden enforced the rule: Amb. 676.

But, it may be said that admitting the rule as settled by the preceding decisions, yet the assignee in the present case was not a purchaser of the subject-matter in litigation, but of a judgment rendered for a separate debt of one of the partners. This objection renders it necessary to consider the question as to what was the equity of the obligor in the bond and debtor under the judgment; for the rule is well established that the assignee takes subject to all the equitable claims of the debtor; and in the present case, it being an assignment of a judgment, the assignee must take subject to all the equities of the debtor up to the time when the debtor had notice of the assignment. In the case of *Murray v. Ballou*, 1 Johns. Ch. 581, it was admitted that the assignee of the bond and mortgage took them subject to all the equitable claims of the obligor and mortgagor, but not to a latent equity of a third person. Yet, even with respect to the latent equity of a third person, in *Renfrew v. Ferris et al.*, 1 Dow's Parl. Rep. 50, it was held, on appeal in a Scotch case, "that a latent equity in a third person shall defeat a *bona fide* assignee of a right without notice;" from which it appears that with notice it would. In the present case it is not necessary to consider the rights of third persons, since the inquiry is confined to the equity of the obligor, who is the debtor under the judgment which has been assigned, and is within the rule that the assignee takes subject to all his equitable claims.

In *Norton v. Rose*, Washington's Rep. 233, this question as to the equities of the obligor, and how far they prevail against an assignee, was fully considered and decided. A bill was exhibited in the court of chancery, in Virginia, by the appellant, to be relieved against a judgment at law recovered against him by the appellee upon an assigned obligation for the payment of money. The equity stated was, that the plaintiff had bound himself to pay to George Anderson four hundred and

fifty pounds, being the balance supposed to be due upon a settlement of accounts; that he had insisted upon certain credits for money paid by Charles Harris to George Anderson, to a part of which he, the plaintiff, was entitled, but that the plaintiff, relying upon Anderson's assurances that no payment had been made to him by Harris, and that he was insolvent, gave his obligation to Anderson for the four hundred and fifty pounds. The bill prayed an injunction against a judgment obtained upon the obligation by the defendant Rose, as assignee thereof; also to be allowed all discounts which he could make appear against Anderson; and for general relief. An injunction till further order was awarded. The defendant Rose, by his answer, denied any notice of the plaintiff's equity at the time of the assignment made to him, and insisted that he was a *bona fide* purchaser of the debt in question, for a valuable consideration paid to Anderson. The decree, or so much of it as relates to the subject of our present inquiry, determined that the plaintiff could not set off against the said debt, as held by Rose, an equitable demand which he might have against George Anderson; and the bill was dismissed as to the defendant Rose. From this decree Norton appealed. The case was fully argued in the court of appeals, and the judges delivered their opinions *seriatim*. The principles applicable to the present case are so clearly and forcibly stated in these opinions that I cannot better express my own views than to adopt the opinions at large.

Roane, J., said: "There are some points in this cause which are not controverted by either side. It is admitted that upon the principles of the common law, a chose in action is not assignable; that is, the assignment does not give to the assignee a right to maintain an action in his own name. It is also conceded that, in England, the assignee of a bond takes it charged with every species of equity which was attached to it in the hands of the obligee. If a different principle prevailed in this country it must grow out of the acts of assembly which authorized the assignment of bonds. The intention of these was to alter the common law, so far as it prevented bonds from being assigned, and to give to the assignee a right to sue in his own name, and in the same manner as the obligee might have done. It was not intended to abridge the rights of the obligor, or to enlarge those of the assignee beyond that of suing in his own name; and since it is clear that prior to this law an original equity attached to the bond, following it into the hands of the

assignee, this law does not expressly nor by implication destroy that principle. With respect to the provision in the act of assembly, it contemplates legal discounts only. The words, the plaintiff shall allow all discounts which the defendant can prove, were meant to extend those discounts beyond the credits which might be indorsed on the bond; and the latter words, before notice of such assignment was given to the defendant, were meant to restrain the discounts to such as existed prior to notice of the assignment. This enlarging and restraining proviso was necessary, in order to express clearly the meaning of the legislature; but neither the proviso, nor any other part of this act, was intended to extend or abridge equitable discounts, which were not in the contemplation of the legislature when making this law. The assignee, it is admitted, takes the bond at his peril, so far at least as the possible claim of the obligor to discounts may extend. If he chose not to encounter this risk, nor to repose entire confidence in the obligee, he should inquire of the obligor, and from him obtain information respecting, at least, this part of the subject. With the same convenience may the inquiry to any equitable objections be attached to the bond. The two cases are precisely within the same reason, and I can discover no principle of policy or justice which should so widely distinguish them. I am clear in the opinion that an equity existing against the bond is not lost or extinguished by an assignment for valuable consideration and without notice. It is true, Norton's interest in the goods sold by Harris is not established in the proof; but the ground of the chancellor's decree being wrong, it must be reversed, and the cause remanded for further proceedings, so as to let in Mr. Norton to the proof of his equity."

Carrington, J., in the concluding part of his opinion, remarked: "The case now under consideration comes fully within those principles which seem to be correct. Norton and Anderson were concerned together in trade, and upon a settlement of accounts Norton claimed a credit for the proceeds of a quantity of goods in the hands of Harris. But, Anderson assuring him that he had received no part of those proceeds, Norton, unsuspecting of the truth, gave his bond for the balance as it stood. Rose, it is admitted, was a fair, *bona fide* purchaser of the land. He is chargeable only with neglect. He might and ought to have satisfied himself that the debt was justly due before he received it. If, upon an inquiry, Norton assented to the payment, or acknowledged he had no objections

to it, this would have deprived him of his equity against Rose. It was easy for any person wishing to take an assignment of the bond to make the inquiry. He would know at once where to make the application. On the other hand, Norton could not give a special notice to the person who was about to obtain it; and the public papers would afford a very uncertain channel of information. Upon the whole, I am clear that the decree is erroneous, and ought to be reversed."

Lyon, J., said: "If Norton had given this bond before assignments were sanctioned by legislative authority, it is admitted on all hands that his equity would have followed the bond into the hands of an assignee. If so, is it possible that the legislature could have meditated so much injustice as to exclude him from setting up an objection to the debt which, but for the law, he might have made? Whatever would then have been the construction of the law, must be the construction of it at this day. I mention this to show that the legislature, by making bonds assignable, did not mean to deprive the obligors of any equitable objections which they might have against them. Upon the whole, I concur in opinion with the other judges." See, also, the case of *Pickett v. Morris*, 2 Washington's Rep. 255.

The two preceding cases, which were decided in the court of appeals of Virginia, clearly establishes the principle that the assignee takes subject, not only to the legal, but also to the equitable claims of the obligor; and in the case of *Norton v. Rose*, it was a claim arising out of partnership transactions. The equitable claim to a further credit was founded on the right of one of the partners to his proportion of funds received by the other, to whom on settlement he had executed a bond without being allowed the credit. The court held the assignee liable, notwithstanding he had no notice of the equitable claim, and was a purchaser for valuable consideration. In all the cases I have referred to, the assignee was a purchaser for valuable consideration. But how stands the present case in this respect? Was Martin W. Bates, or were the creditors for whose use he took the assignment of the judgment from Mitchell, purchasers for a valuable consideration?

It appears that after the final hearing of the suit in chancery, which was had at the August term, 1823, in which suit Lockwood, as one of the partners, was claiming a balance due him from Mitchell, the whole matter in controversy being confined to the question of indebtedness, and the accounts filed

under the interlocutory decree, and the exceptions heard and considered, that while matters were thus pending, and when the chancellor had the same under advisement for the purpose of making up his decree, Mitchell, the defendant, being indebted to other persons and insolvent or embarrassed, assigned this judgment, which he had against Lockwood, to Martin W. Bates, in trust for certain other creditors, they having judgments against him. It is not alleged that any valuable consideration was actually paid by the assignee, or that satisfaction was entered on the judgments for the payment of which the assignment was made. From all that appears it was nothing more than an assignment of a collateral security. This presents a case very different from that of purchaser for valuable consideration, who has actually paid money; and more especially so, when the assignee was the solicitor on behalf of the defendant, Mitchell, and consequently after the final hearing, in 1823, fully acquainted with the whole subject. In the case of *Turton v. Benson*, 1 P. Wms. 497, Benson's administratrix assigned Turton's bond in trust for the benefit of Benson's creditors. Lord Chancellor Parker declared that as to Benson's pretended assignment of the bond, it was upon no consideration; but if it were, yet in truth it was not an assignment, but an agreement only that the assignee should have all the fair and equitable advantage and benefit of the bond that the assignor himself was entitled to, and if nothing was due, nothing could be assigned over. The lord chancellor further said, "as to what had been urged, that the creditors of Benson were numerous and in danger of losing their debts through a deficiency of assets, that would be of no weight; for still the creditors of Benson must be paid out of Benson's estate, and not out of the estate of another man." This case in *Peere Williams I* have adverted to as fully answering the suggestion made by defendant's counsel, that the assignment in the present case was for a valuable consideration, and that if it be not sustained, the creditors for whose use it was made will lose their debts. The remark made by the lord chancellor is founded upon the clearest principles of equity and justice.

It is admitted that at law there cannot be a set-off under our act of assembly except in cases of mutual debts; but where there are, upon accounts, mutual credits between two parties, though they cannot be set off at law, yet it is the common ground of a bill in equity. This was the opinion of Lord Chancellor Loughborough, in the case of *James v. Kynnier*, 5 Ves. jun., 108, supposing no bankruptcy had taken place.

In the case of *French, assignee, v. Fenn*, 3 Doug. 257, being a case of bankruptcy, the set-off was allowed upon the ground of mutual credit. It was an action of assumpsit brought against the defendant, for money had and received to the use of the plaintiffs, as assignees of Cox. The defendant pleaded the general issue non-assumpsit, and gave notice of set-off. A verdict was found for the plaintiff, subject to the opinion of the court on the following case, viz.: That on the twenty-fourth of January, 1778, Cox, Holford and Fenn agreed to purchase a row of pearls for an adventure in trade, and that Fenn should advance the money. The agreement was as follows: "London, January 24, 1778, J. Cox, J. Holford, and J. Fenn purchased a row of pearls of James L. Jenne for two thousand and fifty pounds, including the commission. The said sum was advanced by J. Fenn upon an agreement that profit and loss thereon should be equally divided between them in thirds; in consequence of which, we, the undersigned, do hereby agree to pay two thirds of the interest thereon, from the said twenty-fourth of January, 1778, till the said row of pearls is sold." In November, 1778, Cox became a bankrupt, after which the defendant sent the row of pearls to China, where it was sold for six thousand pounds, and the net proceeds being five thousand pounds was remitted to the defendant. Cox, at the time of his bankruptcy, was indebted to the defendant in a much larger sum than a third of the profits of the adventure. The question for the consideration of the court, therefore, was whether he was entitled to set-off the sums owing to him from the bankrupt in bar of the action brought by the bankrupt's assignees for a third of the profits arising from the sale of the pearls.

Lord Mansfield said: "The act of parliament is accurately drawn to avoid the injustice that would be done if the words were only mutual debts; and it therefore provides for mutual credit. In this case, credit is given to the defendant for a row of pearls, which is to belong in thirds to three persons. As Fenn advanced the whole money, the other two were to pay him interest for their shares until the pearls were sold. There is no doubt but there was a mutual credit. Cox had trusted him with the pearls, and he had trusted Cox with other goods, which in all probability he would not have otherwise done. This is the real justice of the case, if there had been no bankruptcy; and the bankruptcy ought not to alter the real justice of the case."

Upon a full consideration of all the cases, I am of opinion that the complainant is entitled to relief, and to have the amounts due him under the decree set off against the sum due upon the judgment.

Let a decree be entered accordingly.

SET-OFFS IN EQUITY receive the same construction as in courts of law, where there are no intervening equities: *McKinley v. Winston*, 19 Ala. 301; *Cave v. Webb*, 22 Id. 583; *Jordan v. Jordan*, 12 Ga. 77; *Reppy v. Reppy*, 46 Mo. 571. But where peculiar equities exist between the parties, courts of equity will extend the doctrine of set-off beyond that allowed by law: *Lee v. Lee*, 31 Ga. 26; *Foot v. Ketokum*, 15 Vt. 258; *Lindsay v. Jackson*, 2 Paige, 581; *Riddick v. Moore*, 65 N. C. 382. "It is true that equity generally follows the law as to set-off, but it is with limitations and restrictions. If there is no connection between the demands, then the rule is as it is at law. But if there is a connection between the demands, equity acts upon it, and allows a set-off under particular circumstances." 2 Story's Eq. Juria, sec. 1434.

MUTUAL CREDITS are the subjects of set-off in equity. Although there may be mutual and independent debts existing between the parties: 2 Story's Eq. Juria, sec. 1435. One judgment may be set off against another: *Waterman on Set-off*, sec. 337 *et seq.*; *Holmes v. Robinson*, 4 Ohio, 90. The court in this last citation say that, "the practice of setting off one judgment against another between the same parties and due in the same rights is ancient and well established. So, also, *Camp v. Pace*, 40 Ga. 45; *Meloy v. Hawk*, 32 Ind. 94. And in equity judgments recovered between the same parties in different courts, may be set off: *Webster v. McDaniel*, 2 Del. Ch. 397." The right of the parties to have one judgment made to cancel another *pro tanto* is just as perfect where the judgments are rendered in different courts as where they are rendered in the same court." Worden, J., in *Brooks v. Harris*, 41 Ind. 390, 393. The fact that an appeal has been taken and is still pending, will not prevent the set-off of the judgment: *Gaddis v. Leeson*, 55 Ill. 522; *Brooks v. Harris*, 41 Ind. 390. If a judgment be pleaded as a set-off, when it is a proper matter of set-off, and be disallowed by the jury it is extinguished and can no longer be the basis of an action: *Freeman on Judgments*, sec. 279. See the subject of set-off discussed in the note to *Gregg v. James*, *post*.

THAT THE PENDENCY OF AN ACTION is of itself notice to the purchaser of the land involved, so as to bind the property in his hands, in the absence of any statute altering the rule, see *Jackson v. Dickenson*, 8 Am. Dec. 236, and *Wade on Notice*, chap. 5.

PRE-EXISTING DEBT—PURCHASER FOR VALUE.—The question whether a person is a purchaser, or incumbrancer for value, is one which frequently arises for judicial determination, and out of this question arises the further inquiry, what is a valuable consideration? In the foregoing case of *Lockwood v. Bates*, the court held, that where one takes a security for the purpose of securing a pre-existing debt, he is not entitled to the equities of an incumbrancer, for value. This is in harmony with the authorities in several of the states. "As a general rule, a purchaser of the legal title, who receives his conveyance merely in consideration of a prior indebtedness, is not entitled to protection, because he has lost nothing by his purchase." *Padgett v. Lawrence*. 10 Pai. 180; *Coddington v. Bay*, 20 Johns. 637; *Root v. French*, 13 Wend. 579; *Stallar*

v. *McDonald*, 6 Hill, 93; *Dickerson v. Tillinghast*, 4 Pai. 215; *Agricultural Bank v. Dorsey*, 1 Freem. Ch. 338; *Cummings v. Boyd*, 83 Pa. St. 372; *Royer v. Keystone National Bank*, 83 Pa. St. 248; *Moore v. Ryder*, 65 N. Y. 441. This rule is, perhaps, sustained by a slight preponderance of the authorities, but it by no means meets with universal acquiescence, and the tendency to declare a pre-existing indebtedness a sufficient consideration to entitle one to the equities of a purchaser or holder for value, seems increasing in strength: *Payne v. Bensley*, 8 Cal. 260; *Robinson v. Smith*, 14 Id. 94; *Naglee v. Lyman*, 14 Id. 150; *Frey v. Clifford*, 44 Id. 335; *Knaz v. Clifford*, 38 Wis. 651; *Heath v. Silwerthorn L. M. Co.*, 39 Wis. 146; *Knaz v. Hunt*, 18 Mo. 174; note to *Bay v. Coddington*, 9 Am. Dec. 368; Daniel on Neg. Inst., sec. 827.

CASES
FROM THE
SUPREME COURT
OF
ILLINOIS.

MASON v. WASH.

[BRESEE, 39.*]

THE ASSIGNOR OF A NOTE IS NOT LIABLE thereon, under the Illinois statute, unless the money cannot be obtained after due diligence in an action against the maker.

THE LAWS OF ANOTHER STATE cannot be noticed judicially, but must be pleaded and proved.

A DISCHARGE UNDER THE BANKRUPT LAW OF ANOTHER STATE will not bar a suit here upon a contract made before such discharge.

APPEAL from a judgment obtained against the appellant as assignor of a certain note. The declaration alleged that the note sued on was executed by certain parties at New York, payable six months after date to Mason, the appellant, or order, and was on the same day assigned by the appellant to the appellees; that at maturity it was presented to the makers for payment and payment refused, of which the appellant was duly notified. A demurrer to the declaration was overruled. The appellant then pleaded, among other matters, a discharge under the bankrupt laws of New York, which plea was adjudged bad on demurrer, and a motion in arrest of judgment having been overruled, judgment was given for the appellees. Upon appeal from this judgment, the errors assigned were: 1. The overruling of the demurrer to the declaration; 2. The overruling of the motion in arrest of judgment; and 3. The allowance of the demurrer to the plea.

* The pages referred to are those of Beecher's edition of Breese.

By Court,* REYNOLDS, C. J. In this case the court is called upon to say whether sufficient facts are shown in the pleadings to authorize the plaintiff below to recover. This depends, we conceive, upon the sound construction to be given to our act of the legislature, making promissory notes assignable. We cannot give to that act the same construction that is given to the statute of Anne. The provisions of the two statutes are different; the statute of Anne places promissory notes upon the same footing with inland bills of exchange—ours does not. Ours makes notes for the payment of property assignable; the statute of Anne does not. That statute was passed for the furtherance of commerce, and to suit the convenience and interests of a great commercial people. Ours was enacted at a time when but few persons inhabited the country, and whose pursuits were domestic and agricultural. Our statute expressly declares that the assignor shall not be liable until due diligence has been used by the holder to obtain the money from the maker. To give our statute the same construction that the statute of Anne receives, would, in the opinion of the court, defeat the intention of the legislature, and the obvious understanding of the people. Hence, we are irresistibly led to conclude that the diligence contemplated by our statute is diligence by suit, when that course will obtain the money. No suit, then, having been commenced and prosecuted against the makers of this note, as appears from the pleadings, the declaration is insufficient, and no recovery can be had thereon under the laws of this state. But here we are met by an argument that the right of action accrued under the laws of New York, the contract having been made there, and that the laws of that state must furnish the rule of decision in this case.

It is a sufficient answer to that argument to remark, that the laws of New York were neither pleaded nor proved in the court below, and that this court cannot, *ex officio*, take notice of the laws of a foreign court. Here we might stop; but as the question which is the foundation of the third error assigned, may again be raised in the court below, it will be best once for all, to settle it, and in doing so, it will be useless, and accounted a

* The judges of this court prior to Jan. 1825, were Joseph Philips, C. J., appointed Oct. 9, 1818; resigned July 4, 1822. Thomas Reynolds, C. J., appointed August, 1822. Associate justices appointed Oct. 9, 1818; Thomas C. Browne, John Reynolds, William P. Foster. Judge Foster resigned June 22, 1819, without taking his seat, and William Wilson was appointed in his stead, August 7, 1819. At the session of the legislature in Dec. 1824, the following were elected and commissioned Jan. 19, 1825: William Wilson, C. J., and Thomas C. Browne, Samuel D. Lockwood, and Theophilus W. Smith, associate justices.

vain boast of learning to enter into argument or reasoning upon the subject, it having been settled by the highest judicial tribunal known to our government. The contract in this case was made after the passage of the bankrupt law of New York, and the discharge obtained under that law. But as the supreme court of the United States has determined that the discharge is equally unavailing, whether the contract was made before or after the passage of the act, this court feels itself bound to yield to that opinion, how much soever some of the court might be disposed to question its correctness. We presume, however, it is founded upon the fact that the power to pass bankrupt laws is delegated to the general government, and hence, the states are restricted.

Some other questions were raised in the argument of this cause, but as they relate principally to the sufficiency of the testimony to authorize the finding of the jury, are not of a character to require the interfering hand of this court. The judgment below must be reversed, the appellant recover his costs, and the cause remanded to the court below for new proceedings to be had, not inconsistent with this opinion.

Judgment reversed.

LIABILITY OF ASSIGNOR OF NOTE.—It is well settled under the Illinois statute, that "on the contract of assignment, the indorser only becomes liable in the event that the money cannot be made by legal proceeding," against the maker: *Croskey v. Skinner*, 44 Ill. 321. But the inability to collect from the maker need not, in every case, be demonstrated by actual suit before resorting to the assignor, for his liability depends upon the *fact* of such inability to collect, and not upon the *manner* in which it is made manifest. He may be held liable: "1. Where the assignee, by the exercise of due diligence, prosecutes the maker to insolvency; 2. Where the institution of a suit against the maker would be unavailing; 3. Where the maker has absconded or left the state when the note falls due. By the contract of assignment the assignor undertakes to pay the note on the happening of either of these contingencies:" *Crouch v. Hall*, 15 Ill. 263.

FAILURE TO COLLECT BY DUE DILIGENCE, in prosecuting the maker, renders the assignor liable: *Thompson v. Armstrong*, Breese, 48; *Tarilton v. Miller*, Id. 68. And, on the other hand, failure to use such due diligence discharges the assignor where a prosecution would have been availing: *Wilson v. Van Winkle*, 2 Gilm. 684; *Curtis v. Gorman*, 19 Ill. 141; *Allison v. Smith*, 20 Id. 104; *Sherman v. Smith*, Id. 350; *Nixon v. Weyhrich*, Id. 600.

THE DUE DILIGENCE REQUIRED OF THE ASSIGNEE must be used at every stage of the proceedings, from the commencement of them until satisfaction is had or shown to be impossible. The suit must be commenced at the first term of the court after the note falls due if there is time for the service and return of the writ: *Lusk v. Cook*, Breese, 84; *Chalmers v. Moore*, 22 Ill. 359. It must be brought in the court of competent jurisdiction in which judgment

can be soonest obtained, where a speedy judgment will bring the money: *Allison v. Smith*, 20 Ill. 104. The execution must be seasonably issued, *Bestor v. Walker*, 4 Gilm. 3, and must be left in the officer's hands during the whole time it has to run unless it is affirmatively shown by pleading and proof that such a course would have been useless: *Hamlin v. Reynolds*, 22 Ill. 207. And reasonable diligence should be used to find property upon which to levy the execution: *Nixon v. Weyrich*, 20 Ill. 600. If after obtaining judgment an injunction is issued out of chancery staying the proceedings, and the judgment is finally perpetually enjoined, it will be "due diligence" if the assignee appears and defends the chancery suit: *Wilson v. Van Winkle*, 2 Gilm. 684.

WHERE A SUIT WOULD CLEARLY BE UNAVAILING, due diligence in prosecuting the maker is dispensed with and the assignor is liable; as where the maker is insolvent at the maturity of the note: *Humphreys v. Collier*, 1 Scam. 47; *Bledsoe v. Graves*, 4 Id. 385; *Kelly v. Graves*, 74 Ill. 423; *Aldrich v. Goodell*, 75 Id. 452; *Wickersham v. Altom*, 77 Id. 620. The mere fact that the maker's property is heavily incumbered will not be sufficient: *Roberts v. Haskell*, 20 Id. 59.

WHERE THE MAKER HAS ABSCONDED or left the state, due diligence in suit will be excused: *Hilborn v. Artus*, 3 Scam. 346; *Schuttler v. Piatt*, 12 Ill. 419. But if the assignment was made after maturity, the maker being out of the state at the time, the assignee can hold the assignor only on showing due diligence in suit against the maker, or that it would have been unavailing: *Crouch v. Hall*, 15 Ill. 264. To excuse due diligence in suit the assignee must aver and prove the maker's absence from the state. An allegation that "at the time the note became due and payable diligent search was made at the said county for the maker, for the purpose of demanding payment thereof, but that he could not be found," is insufficient, as he might be in another county: *Tarleton v. Miller*, Breese, 68.

PROOF OF STATUTES OF A SISTER STATE.—For an examination of the law and a collection of the cases on this point, see the note to *State v. Twitty*, 11 Am. Dec. 779.

DISCHARGE UNDER INSOLVENT LAW OF ANOTHER STATE.—Upon this subject see *Smith v. Smith*, 3 Am. Dec. 410, and note; *Baker v. Wheaton*, 4 Id. 71, and note; *White v. Caulfield*, 5 Id. 249; *Blanchard v. Russell*, 7 Id. 106, and note; and *Vanuxem v. Haselhurst*, Id. 582, and note.

FORESTER v. GUARD.

[BRESEE, 74.]

STATEMENTS OF JURORS ARE NOT ADMISSIBLE to impeach their verdict.

AN AFFIDAVIT OF NEWLY DISCOVERED TESTIMONY must state the names of the witnesses and the facts to which they will testify.

APPEAL. The opinion states the case.

By Court, REYNOLDS, C. J. In this case, the only error relied upon is that the court below erred in granting a new trial. There were four reasons assigned for a new trial: 1. The verdict was against law and evidence; 2. The discovery of new

evidence; 3. The verdict of the jury was predicated upon the statements of the jurors in relation to the controversy while in the jury-rooms; 4. One of the jurors separated from the jury while deliberating.

The fact that the verdict was predicated upon the statements of the jurors after they withdrew, is disclosed by the affidavit of one of the plaintiffs below, founded upon the confessions of one of the jurors. This the court thinks improper. The statements of jurors ought not to be received to impeach their verdicts. The affidavit disclosing the discovery of material testimony does not state the name of the witness, nor the facts he could prove. It is, therefore, insufficient. An affidavit should state the facts, that the court may judge of their materiality. If the new trial had been granted upon the affidavit alone, the court would say it was improperly granted; but as there were other grounds, to wit., that the verdict was against evidence, the court cannot say there was error; on the contrary, the facts in the case seem to have warranted the interposition of the court. The judgment is, therefore, affirmed.

Judgment affirmed.

THE INADMISSIBILITY OF STATEMENTS OF JURORS to impeach their verdict by showing misconduct, is a settled principle of the law of jury trials: *Profatt on Jury Trial*, sec. 408; *Apthorpe v. Backus*, 1 Am. Dec. 26; *Cluggage v. Swan*, 5 Id. 400; *Faise v. Delaval*, 1 T. R. 11; *Dana v. Tucker*, 4 Johns. 487; *Clum v. Smith*, 5 Hill, 560; *Meade v. Smith*, 16 Conn. 346; *Woodward v. Leavitt*, 107 Mass. 453; *O'Barr v. Alexander*, 37 Ga. 195; *Hall v. Robinson*, 25 Iowa, 91; *Knowlton v. McMahon*, 13 Minn. 396; *Stanley v. Sutherland*, 54 Ind. 339; *State v. Pike*, 65 Me. 111; *Gale v. N. Y. R. R. Co.*, 53 How. Pr. 385; *Brown v. Cole*, 45 Iowa, 601; *Lucas v. Cannon*, 13 Bush, 650; *Chevalier v. Dyas*, 28 La. An. 359; *State v. Frugé*, Id. 657. And this is the rule in Illinois: *Smith v. Eames*, 3 Scam. 81; *Martin v. Ehrensels*, 24 Ill. 187; *Peck v. Brewer*, 48 Id. 54. Nor are the affidavits of other persons admissible to impeach the verdict where they obtain their information from statements of the jurors: *Allison v. People*, 45 Ill. 37. It was held, however, in *Sawyer v. Stephenson*, Breese, 24, that the affidavit of one of the jurors was admissible to prove that another of the jurors had given new testimony in the cause after they retired to the jury-room. This decision may be regarded as practically overruled by the cases already cited.

JURORS' AFFIDAVITS ARE ADMISSIBLE, however, upon matters not connected with their acts or conduct at the trial. Thus, the affidavit of a juror may be taken to prove that he was not qualified as a juror by reason of being an alien: *Guykowski v. People*, 1 Scam. 482. So where certain jurors never in fact agreed to the verdict, but being persuaded by a majority of their fellows that it was only necessary for a majority to agree, did not object to it when it was returned, it was held that their affidavits were admissible to show that they had never in fact consented to the verdict: *Cochran v. Street*,

2 Wash. (Va.) 79. It is only when jurors have agreed to the verdict that they are estopped from impeaching it. Upon similar principles it has been held that where the foreman delivered the verdict erroneously it might be set aside upon the affidavit of the jurors: *Cogan v. Edden*, 1 Burr. 383. So where the jury, by mistaking the meaning of the legal terms employed, returned a verdict for the wrong party: *Little v. Larrabee*, 11 Am. Dec. 43; *sed contra*, see *Chevalier v. Dias*, 23 La. An. 359. So where the foreman announced a verdict different from that agreed to by the jury: *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am. Rep. 544. The testimony of jurors is admissible also to prove a mistake by the clerk in entering the verdict, or by the court in directing its entry: *Jackson v. Dickenson*, 8 Am. Dec. 236. Such testimony is admissible to show the misconduct of a party, or of an officer having charge of the jury: *Thomas v. Chapman*, 45 Barb. 98.

AFFIDAVITS SHOWING VERDICT OBTAINED BY CHANCE.—There is some diversity of adjudication on the question as to whether the affidavits of jurors are admissible to prove that they determined by chance what verdict they would return. The better opinion and the weight of authority seem however to be against the admissibility of such affidavits. The cases on this point are collected and reviewed in the note to *Warner v. Robinson*, 1 Am. Dec. 38.

AFFIDAVITS OF JURORS TO SUPPORT THEIR VERDICT are admissible: *Profatt on Jury Trial*, sec. 410; *Handy v. Providence*, 1 R. I. 400; *Smith v. Eames*, 3 Scam. 76; *Martin v. Ehrenfels*, 24 Ill. 187; *Peck v. Brewer*, 48 Id. 54.

AN AFFIDAVIT OF NEWLY DISCOVERED EVIDENCE, as a ground for a new trial should show: 1. The names of the witnesses; 2. The testimony expected from them; 3. That the evidence is newly discovered; 4. That due diligence was used to procure it; 5. That it is material; 6. That it is not cumulative; 7. That it is not impeaching; 8. That it will probably change the result: *Perry v. Cochran*, 1 Cal. 180; *Stone v. Rose*, 2 La. Ann. 225; *McCombs v. Chandler*, 5 Harr. (Del.) 423; *Ludlow v. Park*, 4 Ohio, 5; *Burns v. Wise*, 2 Ark. 33; *Robins v. Fowler*, Id. 133; *Bourland v. Skinner*, 11 Id. 671; *Pleasant v. State*, 13 Id. 360; *Merrick v. Britton*, 26 Id. 496; *Martin v. Garver*, 40 Ind. 351; *State v. Ray*, 53 Mo. 345; *Parsons v. Platt*, 37 Conn. 563; *Wallace v. Tumlin*, 42 Ga. 462; *Lander v. Miles*, 3 Ore. 40; *Daneby v. State*, 34 Tex. 392; *Smith v. Shultz*, 1 Scam. 490; *Morrison v. Stewart*, 24 Ill. 25; *Martin v. Ehrenfels*, Id. 189; *Calhoun v. O'Neal*, 53 Id. 354. The affidavit should state positively that the newly discovered evidence is true: *Richey v. West*, 23 Ill. 385. It should also be supported by the affidavits of the witnesses by whom the facts are expected to be proved, if they can be produced, and if not their absence should be explained: *Lander v. Miles*, 3 Ore. 40; *Rogers v. Huie*, 1 Cal. 433; *Jenny Lind Co. v. Bower*, 11 Id. 194; *Arnold v. Skaggs*, 35 Id. 684; *Case v. Coddling*, 38 Id. 194; *Smith v. Cushing*, 18 Wis. 295; *Suggs v. Anderson*, 12 Ga. 461; *Cummins v. Walden*, 4 Blackf. 307; *Priddy v. Dodd*, 4 Ind. 84; *Gibson v. State*, 9 Id. 264; *Warren v. State*, 1 G. Gr. 106; *Maniz v. Malony*, 7 Iowa, 81; *Bright v. Wilson*, 7 B. Mon. 122; *Keogh v. McNitt*, 6 Minn. 513; *Cowan v. Smith*, 35 Ill. 416; *Emory v. Addis*, 71 Id. 273.

MORE v. BAGLEY.

[BREWER, 94.]

NEGLIGENT TO MAKE A DEFENSE AT LAW is a bar to equitable relief.

APPEAL. The opinion states the case.

McRoberts, for the defendants in error.

By Court, LOCKWOOD, J. It appears from the bill exhibited in this cause, that an action was commenced before a justice of the peace on a promissory note, and that on the trial of the cause, the defendants offered to prove, by their own oaths, the fact, and called on plaintiff below to disprove, that the consideration of the note was for the sale of an improvement on public lands. The bill also states that the justice overruled this defense, and gave judgment for the plaintiffs. Without intending to decide whether this defense ought to have availed the defendants, if they had proved it, it is sufficient for this court to say, that the complainants have mistaken their remedy. The defense set up by the complainants before the justice was purely a legal one. Their only remedy, in case the justice decided erroneously, was to appeal to the circuit court. The complainants having neglected to avail themselves of this remedy, cannot now ask the interposition of a court of equity. The allegation in the bill, that complainants could only prove the facts in what the consideration of the note consisted, either by their own oath, or the oath of the plaintiff, can be no reason for not prosecuting an appeal from the justice's decision. Had an appeal been taken, the complainants could, by filing a bill of discovery, have obtained the necessary proof. In the case of *Duncan v. Lyon*, 3 Johns. Ch. 351 [8 Am. Dec. 513], Chancellor Kent says: That "it is a settled principle that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report (of referees) by facts, or on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." The decree therefore must be reversed.

Decree reversed.

CORNELIUS v. WASH.

[BREWER, 98.]

THE CONFIDENCE REPOSED IN COUNSEL IS PERSONAL, and cannot be delegated to another without the client's consent. Hence, the counsel employed in a case must personally contribute his legal knowledge and assistance in conducting the suit to its final determination.

APPEAL from a judgment obtained in the circuit court by Wash, the appellee, against the appellant, in an action brought by the said Wash to recover for his services as counsel in a certain suit. From the bill of exceptions it appeared to have been proved at the trial that Cornelius, the appellant, employed Wash as counsel for a certain negro, in a suit instituted by him against other parties for the recovery of his freedom; that the said negro finally recovered judgment in said suit, but that Wash did not appear in said suit or render any personal assistance therein, but the same was conducted with great ability by Peck and Carr, who announced to the court when Wash's name was called that they would attend to the case for him, although there was no evidence that they were employed by him. It appeared, however, that Carr had become a partner of Wash about the time of the trial of the said suit. It further appeared that Carr had exacted a fee of twenty-five dollars from the appellant for his services, which had been paid. It was also proved that at the time of employing Wash the appellant gave him a note for sixty dollars, and promised to pay him the further sum of fifty dollars; that Wash had sued on the said sixty dollar note, but that in said suit the appellant relied on a failure of consideration, because Wash had not rendered any services, and that the appellant prevailed in said suit.

At the trial of this cause in the circuit court, the appellant moved for an instruction to the jury, as in a case of nonsuit, at the close of the plaintiff's evidence, that the evidence did not show that the said Wash had rendered any services in the suit instituted by the said negro, and that therefore he was not entitled to recover, but the court refused the instruction and instructed the jury that if they believed from the contract that Wash was to have the fifty dollars if the negro recovered his freedom, whether the said Wash rendered any service or not, they should find for the plaintiff, and left the construction of the contract to them. At the close of the case for the defendant, the court gave further instructions to the jury, the substance of which is stated in the opinion. Verdict for the

plaintiff for fifty-nine dollars damages; motion for a new trial overruled, and judgment on the verdict, from which the defendant appealed on exceptions to the instructions of the court, and to the refusal to give the instruction asked by the defendant.

Blackwell, for the plaintiff.

Starr, for the defendant.

By Court,* Lockwood, J. Two questions were presented in this case: 1. What is the true construction of the obligation made by the plaintiff in error to the defendant in error? 2. Ought the instructions prayed for to have been given to the jury? On the first point the court are of opinion that by the true construction of the contract of the parties, the relation of client and counsel was created, and that it became necessary for Mr. Wash either to have contributed his legal knowledge or assistance in the suit of *George v. Whiteside and Bradshaw*, or have been ready and willing at the trial to have aided and conducted the suit to its final termination. The confidence reposed in counsel is of a personal nature, and cannot be delegated without the consent of the client. The evident object of the party in making this contract being to obtain the legal services of Mr. Wash in prosecuting the suit, the court ought to have instructed the jury that unless they had believed Cornelius had dispensed with the personal services of Mr. Wash, they ought to find for Cornelius.

In relation to the second charge given to the jury, to wit, "that although the plaintiff did not in person attend to the suit for George, yet if Peck and Carr did attend to it for him, as well as he, Wash, could have done, Wash would have a right to recover." If the court is right in their construction of this contract, this instruction was clearly wrong. In the employment of counsel to manage a cause, the client is governed by a variety of considerations which relate to the character, learning and skill of the lawyer, and whether the client exercises a sound judgment in his selection is a matter in which he alone is interested, but he is entitled to receive the identical legal services he has contracted for. It may, with propriety, be asked, by what rule could a jury decide whether Peck and Carr did render the same services that Wash might have done, had he been present? It is only sufficient to state the question to show the

*WILSON, C. J., was absent during the whole of this term.

utter impracticability of its being determined by a jury. They can have no data on which to predicate an opinion. The judgment must be reversed with costs, with permission to the defendant in error to have the cause remanded to the circuit court for further proceedings, not inconsistent with this opinion.

Judgment reversed.

ATTORNEY AND CLIENT.—A contract with a legal firm for their services as attorneys and counselors, is personal with each member of the firm, and a dissolution of the partnership does not affect the contract: *Walker v. Goodrich*, 16 Ill. 341. When a party engages the services of a particular lawyer or association of lawyers, he is entitled to the services of every one of them, and if one abandons the retainer with the assent of the others, express or implied, or they attempt to supply his place with another of equal or superior qualification, it will be no performance: *Morgan v. Roberts*, 38 Ill. 65. And the contract between an attorney and client continues to the end of the suit: *Smyth v. Harvie*, 31 Id. 62.

MORGAN v. HAYS.

[BREWER, 126.]

SETTING ASIDE JUDGMENT AT SUBSEQUENT TERM.—After an entry of final judgment the court cannot, at a subsequent term, set it aside and direct a nonsuit.

ERROR. The opinion states the case.

By Court, SMITH, J. In this case it is not deemed necessary to decide more than one of the points presented for consideration. That one is the decision of the court below in setting aside the final judgment entered in the cause, at a term subsequent to the one at which such judgment was entered, and directing a nonsuit. On the trial of the cause, the plaintiff below, who is plaintiff here, offered to give in evidence a record of a cause determined in one of the circuit courts of this state. This the defendant's counsel objected to, but the court overruled the objection and permitted the record to be given to the jury as evidence. The jury found a verdict for the plaintiff, and a final judgment was entered thereon. The court then continued the cause to the next term, when it set aside the final judgment and directed a judgment of nonsuit to be entered. Two questions arise here for consideration: 1. Had the court the power at a term subsequent to the one at which the judgment was regularly entered, to set it aside? 2. If so, was a judgment of nonsuit warranted? That courts have not, as a general proposi-

tion, the right, at a term subsequent to the one at which judgment is entered, to set it aside, we have no doubt. The power to re-adjudicate causes finally disposed of at one term, where the proceedings are regular, at another and subsequent one, would produce consequences too embarrassing and lead to endless and contradictory decisions. If a judge could review the final opinion given at one term, at the next, why may it not be imagined that he might be equally dissatisfied with the second opinion and reverse that, and continue to vacillate as often as the parties might desire to present their cases before him. If, on the trial, either party is dissatisfied with the decision of the court, the remedy for a correction is by excepting to this opinion, or by application afterwards for a new trial. Appellate courts are established for the purpose of correcting the errors of inferior tribunals; but if inferior ones possessed the power at all times to review their own decisions, the creation of the appellate jurisdiction was vain and useless. The court was therefore wrong in setting aside the judgment; but as the court, from the confused state of the record, may be supposed to have considered that the case had been reserved for a review at a future term, and as we are by no means satisfied that the plaintiff ought, from the evidence contained in the bill of exceptions, to have recovered, we do not feel disposed to interfere with that part of the decision. On the second point, we are clearly of opinion that after the judgment was vacated, the court ought to have directed a new trial. On principle and precedent, a nonsuit could not be directed. The judgment must therefore be reversed and a new trial granted, with directions to the court below to award a *venire de novo*, and that the plaintiff in error recover his costs.

Judgment reversed.

That a court cannot at a subsequent term set aside a judgment, unless such power is expressly given by statute, is well settled: *Cook v. Wood*, 24 Ill. 295; *Cor v. Brackett*, 41 Id. 222; *Messervy v. Beckwith*, Id. 452; *Freeman on Judg.*, sec. 96. Nor can the judgment be amended in a matter of substance after the term: *Bramlet v. Pickett*, *post*, and note thereto; but it may be in a mere matter of form: Id.; *Cook v. Wood*, 24 Ill. 295. Where a motion is made at the term at which a judgment by default was entered, to set the same aside, and such motion is continued until the next term, it may be allowed at the subsequent term: *Windett v. Hamilton*, 52 Ill. 180.

BRADSHAW v. NEWMAN.

[BREWER, 133.]

THE LAW OF A PLACE WHERE A CONTRACT IS MADE must determine its construction and validity. Therefore, a plea in avoidance of a note made in another state, on the ground of unlawful consideration, must aver that the object for which it was given was prohibited by the laws of that state.

A PLEA OF FAILURE OF CONSIDERATION must state how it has failed.

ERROR. The case is stated in the opinion.

Starr, for the plaintiff in error.

Cowles, for the defendant in error.

By Court, LOCKWOOD, J. This action was commenced in the Madison circuit court, on a sealed note made on the thirty-first of October, 1818, in the territory of Missouri. The defendant pleaded three pleas, to wit: 1. That the consideration of the note was for the sale of an improvement made upon the public land of the United States, situate in the territory of Arkansas; 2. That the consideration has wholly failed; and, 3. That the note was executed for an improvement right in the Arkansas territory, on land belonging to the United States, and that the plaintiff is and has been for some time past in the possession of said improvement, without purchase or lease from the defendant, wherefore the consideration has failed. To which pleas the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the pleas, and gave judgment for defendant. To reverse which decision a writ of error has been brought to this court. The first plea in this case is extremely inartificially drawn, and it is difficult for the court to ascertain what is the precise point intended to be presented for decision. The question argued upon this plea was that a note executed as the consideration of a sale of an improvement made on the lands of the United States cannot be recovered in the courts of this state, upon the principle that "all contracts which have for their object anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void." The pleadings in this case do not, however, present any such question. The declaration states the contract to have been made in the territory of Missouri, and for anything that is alleged in the plea, the contract may be sanctioned by the laws of

Missouri. No principle is better settled than that the laws of the country where a contract is made shall govern its construction and determine its validity.

The first plea is, therefore, clearly bad. The second plea has frequently been decided to be bad by this court, because it does not set forth in what the failure of the consideration consisted. The third plea is similar to the first, with this addition, that the plaintiff "is, and has been for some time past, in the possession of the said improvement, without purchase or lease from this defendant." This allegation is doubtless introduced for the purpose of showing that the defendant has not received from the plaintiff what he contracted for, as the consideration of the note. It does not, however, appear from the pleas but that the defendant received the possession of the improvement right, or that the plaintiff has ever prevented him from taking and enjoying the possession, and from aught that appears, the defendant may have sold his possession to some third person, who again may have transferred his claim to the plaintiff. The plea is too imperfect to bar the plaintiff's action. It may also be observed in relation to the first and third pleas, that the defendant is guilty of a singular inaccuracy in the statement that the consideration of the note was for an improvement in the territory of Arkansas. The note was dated in 1818, and Arkansas was not formed into a territory until some time after that year. The judgment must be reversed with costs, and the proceedings remanded to the Madison circuit court, and the defendant permitted to amend his pleas.

Judgment reversed.

THE LEX LOCI determines the validity and construction of a contract: *Warder v. Arell*, 1 Am. Dec. 488; *Smith v. Smith*, 3 Id. 410; *De Sobry v. De Laistre*, Id. 536; *Greenwood v. Curtis*, 4 Id. 145. The doctrine of the principal case on this point is approved in *Stacy v. Baker*, 1 Scam. 421, and *Roundtree v. Baker*, 52 Ill. 241.

FAILURE OF A CONSIDERATION AS A DEFENSE.—See on this subject *Hicks v. Parham*, 9 Am. Dec. 745; *Lloyd v. Jewell*, 10 Id. 73. The rule laid down in the principal case that this defense must be specifically pleaded is approved in *Fitzpatrick v. Beatty*, 1 Gilm. 469, and it is held to apply also to the defense of fraud.

GREGG v. JAMES.

[BREWER, 143.]

DEBTS SET OFF MUST BE MUTUAL between the parties to the record. Therefore, in an action to recover a debt due a partnership, a debt due from one copartner cannot be set off.

PAYMENT TO A PARTNER, is payment to the firm unless expressly forbidden by the other partners.

ERROR. The opinion states the case.

By Court, SMITH, J. This was an action of debt on a sealed note, payable to James and Philips. Gregg, who was defendant in the court below, pleaded three pleas:

1. Payment generally; 2. That Philips and himself were mutually indebted to each other before the execution of the note; that prior to the making of the note they attempted a settlement of their respective claims, but Gregg, being then unable to establish his against Philips, executed the note in question to James and Philips, who had become partners in trade, it being given for the amount of Philip's claim against him, leaving his against Philips unadjusted; 3. That the note was given to James and Philips to secure a debt due to Philips only, and that before the commencement of the suit, he paid it to Philips.

To the first and third pleas, the plaintiff took issue, and demurred to the second; to which demurrer the defendant filed his joinder. The court below sustained the demurrer. On the trial, Gregg offered to give in evidence an account of his against Philips which existed anterior to the making of the note given to James and Philips, which the court refused to permit. To this decision an exception was taken. Two points are presented for the consideration of the court: First, that on the issues joined it was competent for Gregg to give in evidence any debt due to him from Philips; secondly, that the second plea was a bar to the action, and the demurrer should have been overruled.

We have no hesitation in saying that on both the points the court below decided correctly. Nothing is better settled than that debts to be set off must be mutual and between the parties to the record. If the issue on the third plea had been what the counsel for Gregg supposes it is, it might perhaps vary the question. But it will be seen that his allegation that the consideration of the note was for a debt originally due to Philips

only, is not noticed in the replication, and issue is taken on the single point of payment only. That part of his plea is treated as a nullity, and must be considered as surplusage. The only inquiry is, was the debt alleged to be due by Philips a debt which could be set off. The note is payable to copartners, and the debt offered to be given in evidence is due, if at all, by only one of the copartners. The rule is that a debt due individually by one copartner cannot be set off in an action to recover a debt due the copartnership. It is not a mutual debt, nor is it between the parties to the record. The offer, therefore, to prove a debt due by one of the copartners, and that confessedly before the making of the note was foreign to the issue before the court. It was in no way pertinent thereto; it was not what the parties had made the issue, viz.: had Gregg paid the note to Philips, for a payment to one was a payment to both, unless strictly forbidden. This reasoning is directly applicable to the second plea. It was not competent for Gregg to plead a state of facts which in themselves amounted to no more than a right of setting off a debt due by Philips alone.

This plea was certainly not good, for he could not plead that which in law could be no defense. The court have examined the authorities quoted by the plaintiff's counsel to support the positions assumed by him, but they are found to be in no way analogous. The demurrer was properly sustained. The judgment of the court below must be affirmed, and the defendants in error recover their costs.

Judgment affirmed.

MUTUALITY OF DEMANDS is one of the cardinal principles of the law of set-off. The general rule is, that in order that the doctrine of set-off may be applied there must be mutual and connected demands between the same parties and in the same right: *Hurlburt v. Ins. Co.*, 2 Sumn. 471; *Wals v. Wilkins*, 4 Yeates, 461; *Watkins v. Gane*, 4 Md. Ch. 13; *Paine v. Whitebridge*, 1 McCord, 7; *Doyle v. Doyle*, 2 Id. 185; *Shepard v. Turner*, 3 Id. 249; *Scott v. Rivers*, 1 Stew. & Port. 19; *Morrison v. Furnham*, 1 A. K. Marsh. 41; *Banton v. Hoomes*, Id. 19; *Cummings v. Williams*, 5 J. J. Marsh. 384; *Woods v. Carlisle*, 6 N. H. 27; *Brown v. Warren*, 43 Id. 430; *Palmer v. Green*, 6 Conn. 19; *Wright v. Rogers*, 3 McLean, 229; *Menfee v. Ball*, 7 Ark. 520; *Grew v. Burditt*, 9 Pick. 265; *Snow v. Conant*, 8 Vt. 308; *Haughton v. Leary*, 3 Dev. & B. 21; *Peoria etc. R. R. Co. v. Neill*, 16 Ill. 269. Set-off is a statutory graft upon the body of the common law and is of equitable origin. Prior to the statutes of 4 and 5 Anne and 2 and 8 George II., the doctrine had no existence at common law, although it had long been a familiar and favorite principle of courts of chancery to adjust in one suit all conflicting demands between the parties, which were readily capable of such adjustment, where,

from the relations and situation of the parties and from the nature of their mutual claims, equity and justice seemed to require a complete and speedy settlement: *Waterman on Set-off*, secs. 10 and 17; *Spurr v. Snyder*, 35 Conn. 172; *Greene v. Darling*, 5 Mason, 201. Courts of law in adopting the doctrine, in obedience to the statute, undertake, so far as is consistent with their established rules, to apply it to the same beneficial purposes for which it has been accustomed to be used in equity. One of the prime objects, both at law and in equity, to which set-off is applied, is the prevention of future litigation between the parties. It is made to operate as a consolidation of suits or actions, enabling the defendant, where he has a claim of the same kind against the plaintiff as that upon which he is sued, to have it settled without resorting to a separate action.

THE DEFENDANT MUST HAVE A SUBSISTING RIGHT OF cross-action against the plaintiff. This is necessarily one of the guiding principles: *Kelly v. Garrett*, 1 Gilm. 649; *Scott v. Rivers*, 1 Stew. & Port. 19; *Houghton v. Leary*, 3 Dev. & B. 21. Nothing can be set off upon which an independent action against the plaintiff could not be immediately maintained: *Battle v. Thompson*, 65 N. C. 406; *Mangum v. Ball*, 43 Miss. 288; *Ewing v. Griswold*, 43 Vt. 400; *Osborne v. Byrne*, 43 Conn. 155; *Case v. Henderson*, 23 La. An. 49; *Case v. Marchand*, Id. 60; *Matteson v. Ellsworth*, 28 Wis. 254; *Orton v. Noonan*, 29 Id. 541. Therefore, where for any reason the defendant could not maintain an action upon his claim against the plaintiff the set-off cannot be allowed. Thus it is held in many cases that where the state is the plaintiff, the defendant cannot set off a cross-demand, because a state cannot be sued without leave: *State v. Baltimore etc. R. R. Co.*, 34 Md. 344; *Commonwealth v. Matlack*, 4 Dall. 303; *State v. Leckie*, 14 La. An. 636; *Treasurers v. Clearie*, 3 Rich. (S. C.) 372; *Borden v. Houston* 2 Tex. 594; *Bates v. Republic*, Id. 616; *Chevalier v. State*, 10 Id. 315; *Commonwealth v. Rodes*, 5 T. B. Mon. 318; see, also, *New Orleans v. Finnerty*, 27 La. An. 681. But it is held by the supreme court of the United States, that in an action by the government set-off may be allowed, because by bringing the action the privilege of sovereignty is waived, and the government is to be deemed to have consented to be sued; and this certainly seems to be the more reasonable view: See the note to *Orleans Nav. Co. v. Schooner Amelia*, *post*, for a review of the decisions referred to. So, a demand conditional or contingent in its nature, cannot be set off: *Shepard v. Turner*, 3 McCord, 249. Hence, a claim, assigned conditionally, for the purpose of being used as a set-off, with the understanding that if not so used it will revert to the assignor, will not be allowed as a set-off: *Claffin v. Dawson*, 58 Ind. 408. The right to maintain an action was made the test also in *Fellows v. Wynan*, 33 N. H. 351, where it was held that in an action against partners for a debt due by the firm, they could not set off money paid to the plaintiff, out of the partnership funds, by one partner on his private debt, because no action could be maintained to recover such money, either by the firm, or by the defrauded partner. Cases supporting the principle upon which this decision is based, are *Greeley v. Wyeth*, 10 N. H. 15; *Homer v. Wood*, 11 Cush. 62; *Jones v. Yates*, 9 Barn. & C. 532; but see *Dob v. Halsey*, 8 Am. Dec. 293, and note.

JOINT DEBTS CANNOT BE SET OFF AGAINST SEPARATE DEBTS, nor separate against joint, because in such cases the parties are not the same: *Ross v. Knight*, 4 N. H. 236; *Woods v. Carlisle*, 6 Id. 27; *Hutchins v. Riddle*, 12 Id. 464; *Palmer v. Green*, 6 Conn. 19; *Pitkin v. Pitkin*, 8 Id. 325; *Bibb v. Saunders*, 2 Bibb, 86; *Blanks v. Smith*, Peck. (Penn.) 186; *Henderson v. Lewis*, 11 Am. Dec. 733; *McDowell v. Tyson*, 14 Serg. & R. 300; *Howe v. Sheppard*, 2

Sumn. 409; *Waters v. Lussard*, 2 Cranch, C. C., 226; *Langley v. Brent*, 3 Id. 365; *Walker v. Leighton*, 11 Mass. 140; *Finney v. Turner*, 10 Mo. 207; *Burgwin v. Babcock*, 11 Ill. 28; *Hinckley v. West*, 9 Id. (4 Gilm.) 136; *Heckenhemper v. Duigwehrs*, 32 Id. 538; *Himrod v. Baugh*, 85 Id. 435; *Bullard v. Dorsey*, 15 Miss. (7 S. & M.) 9; *Murray v. Toland*, 3 Johns. Ch. 569; *Dale v. Cooke*, 4 Id. 11; *Duncan v. Lyon*, 8 Am. Dec. 513; *Pücher v. Patrick*, ante, 54; *Whitaker v. Bush*, Amb. 407; *Ex parte Twogood*, 11 Ves. 517; *Ex Parte Hanson*, 12 Id. 346; *Addis v. Knight*, 2 Meriv. 117. This principle applies in a great variety of cases.

A PARTNER'S SEPARATE DEBT cannot be set off against a claim due the partnership: *Burgwin v. Babcock*, 11 Ill. 28; *Paine v. Whitbridge*, 1 McCord, 7; *Taylor v. Basy*, 5 Ala. 110; *Ross v. Pearson*, 21 Id. 473; *Ward v. Newell*, 37 Tex. 281; *Wasson v. Gould*, 3 Blackf. 18; *Howard v. Warfield*, 4 Har. & M. 21; *Pinckney v. Keyler*, 4 E. D. Smith, 469; *Collier v. Dyer*, 27 Ark. 478; *Birdsall v. Fischer*, 17 Minn. 100; *Meeker v. Thompson*, 43 Conn. 77. But in *Wallenstein v. Selizman*, 7 Bush. 175, it was held that in an action by non-resident partners, who have no property within the state, the debt of an individual partner might be set off, because otherwise the defendant might be compelled to pay his debt without being able to collect what is due him. This case went on the liberal principle of equitable set-off. So in an action between individuals, a debt due from a partnership, of which the plaintiff is a member, or to a partnership of which the defendant is a member, cannot be set off, because this would involve an adjudication of the rights of persons not parties to the action: *West v. Kendrick*, 46 Ga. 526; *Flint v. Tillman*, 2 Heisk. 202; *Hilliard v. Walker*, 11 Ill. 644; *Duramus v. Harrison*, 26 Ala. 326; *Francis v. Rand*, 7 Conn. 221. Nor a debt due from the plaintiff to a firm of which both parties are members, for this would require an adjustment of partnership accounts: *Land v. Cowan*, 19 Ala. 297; *Houston v. Brown*, 3 Ark. 333; *Sample v. Griffith*, 5 Iowa, 376. And in an action against partners a debt from the plaintiff to another firm which has been purchased by one of the defendants cannot be set off: *Wilson v. Runkel*, 38 Wis. 526. But in a suit by a surviving partner for a firm debt, in his own name, an individual debt due from him may be set off: *Masterson v. Goodlett*, 46 Tex. 402; *Holbrook v. Lackey*, 13 Met. 132; *Miller v. Franklin Bank*, 1 Pa. 444. So upon an assignment by one partner of his interest in the firm to his copartner, with power to settle the affairs, it was determined that the latter might set off a claim due the firm in an action against him for an individual debt: *Craig v. Henderson*, 2 Pa. St. 261. But where a note was made to a firm of bankers, one of whom afterwards withdrew, and a new firm was formed, it was held that deposits afterwards made in the bank by the maker of the note could not be set off in an action upon the same: *Dawson v. Wilson*, 55 Ind. 216.

GENERALLY, A DEBT INVOLVING ONE NOT A PARTY to the suit, either as debtor or creditor, cannot be set off. Thus, where the debt attempted to be set off is due from the plaintiff and a third person: *Blankenship v. Rogers*, 10 Ind. 333; *Byrd v. Charles*, 3 S. C. 352; *Wilson v. Keedy*, 8 Gill, 195; *Bridghaus v. Tileston*, 5 Allen, 371; *Wolfe v. Washburn*, 6 Cow. 262; *Fletcher v. Dyche*, 2 T. R. 82; *McKinney v. Bellows*, 3 Blackf. 31. And in the latter case it was held that the rule was not varied by the fact that the plaintiff and his co-debtor, in the claim due the defendant, were non-residents. So, a debt due from the plaintiff to the defendant and another, cannot be set off: *Campbell v. Genet*, 2 Hilt. (N. Y.) 290. And generally no counter-claim or set-off will be allowed which requires the bringing in of other parties: *Coursen v. Hamlin*, 2 Duer, 513.

A DEBT DUE FROM ONE OF SEVERAL JOINT PLAINTIFFS, or to one of several joint defendants, stands upon the same footing, and, as a general rule, cannot be set off. Ordinarily, a set-off must not only not include persons who are not parties, but also all who are parties. To be a complete cross-demand, it must be such that if it were sued independently it would bring identically the same parties into court; and therefore it must exist in favor of all the defendants and against all the plaintiffs. The principle is thus stated in *Kennedy v. Cunningham*, Cheves, 50: "A single defendant cannot set off a demand due to him from one of a number of joint plaintiffs. * * * The same principles are equally applicable to joint defendants. If one joint defendant could set off a demand due from a single plaintiff, he could defeat the plaintiff's demand by a contract which the plaintiff had never made with the parties to the record. Success would enable the defendant who pleaded the discount to defeat one person by making others his creditors; for he would have a right to look to his co-defendants for remuneration for paying their debt, if they had been jointly liable with him. But taking another view, suppose that the defendant, setting up the discount, makes an issue which results, by failure, in costs and expenses beyond those otherwise incident to the action. Who are to pay them? Not that defendant alone, but all are subjected to the costs of the suit." Hence, the set-off should be disallowed if it do not include all the joint plaintiffs: *Warner v. Barker*, 3 Wend. 400; *Archer v. Dunn*, 2 Watts & S. 327; *Watson v. Hensel*, 7 Watts, 344; and all the joint defendants: *Mott v. Burnett*, 2 E. D. Smith, 50; *Jones v. Gilreath*, 6 Ired. 338; *Van Middlesworth v. Van Middlesworth*, 32 Mich. 183; *Woods v. Carlisle*, 6 N. H. 27; *Walker v. Leighton*, 11 Mass. 140; *Sherman v. Crosby*, 11 Johns. 70; *Jones v. Fleming*, 7 Barn. & C. 217; *Buckhanan v. Gamble*, 1 Ga. Dec. 156; *Ryan v. Barger*, 16 Ill. 28; *Hinckley v. West*, 4 Gilm. 136.

THIS RULE OF STRICT MUTUALITY between the parties is however subject to a number of qualifications and exceptions, and on several points the practice in the several states varies considerably: *Waterman on Set-off*, sec. 269 *et seq.* There is much diversity in the different statutes of set-off. Indeed the subject is so entirely under statutory control that it is difficult to lay down any general rules upon it. Where the rights of third persons are not interfered with, there seems to be no limit to the power of the legislature to provide for the setting off of mutual demands even after they have arisen: *Blount v. Windley*, 95 U. S. 173. It is intended to notice here only a few features of the subject.

PARTIES IN INTEREST AND NOT MERE NOMINAL parties are usually regarded by the courts in determining the question as to mutuality of demands: *Waterman on Set-off*, sec. 218; *Chandler v. Drew*, 6 N. H. 469; *Andrews v. Varrell*, 46 Id. 17; *Doyley v. Doyley*, 3 McCord, 185; *Hendricks v. Toole*, 29 Mich. 340. This fact serves to explain some seemingly anomalous decisions. But the rule that parties in interest, and not nominal parties, are to be regarded, has not always been adopted. In a number of New York decisions, made when the statute provided, that in case of set-off, the defendant should have judgment for the excess of his demand over the plaintiffs, it was held that only the parties to the record should be considered, for otherwise a nominal party might get a judgment for a debt which he did not own: *Wheeler v. Raymond*, 5 Cow. 231; *Johnson v. Bridge*, 6 Id. 693; *Raymond v. Wheeler*, 9 Id. 295; *Warner v. Barker*, 3 Wend. 400.

CASES OF PRINCIPAL AND SURETY furnish an important exception to the rule excluding set-offs which are not mutual between all the parties to the

action. In perhaps a majority of the states, it is held that where a principal and surety are sued for a debt, the principal may set off a demand due himself alone. The principal is here regarded as the real party in interest, and the allowance of the set-off in such cases rests upon equitable grounds. Says Redfield, J., in *Downer v. Dana*, 17 Vt. 518: "Although a court of equity will not any more than a court of law, allow a set-off of joint debts against separate debts, yet there are many exceptions. One important exception is where the debts are in reality mutual as where one of the joint debtors is a mere surety." To the same effect is *Brewer v. Norcross*, 17 N. J. Eq. 219. So, also, *Wagner v. Stocking*, 22 Ohio St. 297, where the court says: "It is undoubtedly well settled as a general rule, both at law and in equity, that joint and separate debts cannot be set off against each other. But whenever the character of the joint debt is such that one of the debtors is only a surety for the other, and the separate debt is due to the principal alone, one of the main reasons on which the general rule is based does not exist, for the debts would be in reality between the same parties, and to set them off against each other would not complicate the rights of the parties, nor, ordinarily, embarrass the litigation of the claims. On the contrary, the set-off might settle all the rights of the parties in one action, and liquidate demands that in justice between all the parties ought to compensate each other." The following decisions among others hold a set-off of this kind to be admissible: *Brundridge v. Whitcomb*, 1 Chipman, 180; *Bourne v. Benett*, 4 Bing. 23; *Wartman v. Yost*, 22 Grat. 595; *Dale v. Cooke*, 4 Johns. Ch. 15; *Woods v. Carlisle*, 6 N. H. 27; *Boardman v. Cushing*, 12 Id. 119; *Concord v. Pillsbury*, 33 Id. 310; *Vason v. Beall*, 58 Ga. 500; *Himrod v. Baugh*, 85 Ill. 435. But to make the set-off in such cases admissible, the principal must plead that he is principal and that the other defendants are merely sureties for him: *Harris v. Rivers*, 53 Ind. 216. The principle upon which such a set-off is allowed applies equally where one is sued for an individual debt and claims a set-off of a demand held against the plaintiff for which a third person is surety. It is regarded as the debt of the plaintiff alone since he is bound to reimburse his surety, and may therefore be set off against a demand claimed by him: *Mahurin v. Pearson*, 8 N. H. 539; *Andrews v. Varrell*, 46 Id. 17; *Hoffman v. Gollinger*, 39 Ind. 461; *Hanson, ex parte*, 18 Ves. 232.

WHERE THE DEMAND SUED IS JOINT AND SEVERAL, any one of the defendants may set off a debt due to himself alone from the plaintiff. This is put on the ground that in reality there is a distinct action against each defendant in such a case for the whole debt, to which he may separately plead payment or tender out of his own money; and that a plea of set-off rests upon the same principle: *Austin v. Feland*, 8 Mo. 309; *Pitcher v. Patrick*, ante, 54; *Clark v. McElroy*, 1 Stew. 147; *Ges v. Nicholson*, 2 Id. 512; *Carson v. Barnes*, 1 Ala. 93; *Winston v. Metcalfe*, 66 Id. 756; *Mitchell v. Burt*, 9 Id. 226; *Jones v. Jones*, 12 Id. 244; *Sledge v. Swift*, 53 Id. 110. This is the settled doctrine in Pennsylvania: *Chillerston v. Hammond*, 9 Serg. & R. 68; *Stewart v. Coulter*, 12 Id. 252; *Miller v. Kreiter*, 76 Pa. St. 78. And it is there held generally that a defendant individually sued may set off a debt owing to himself and other persons jointly, if those other persons consent thereto: *Tustin v. Cameron*, 5 Whart. 379; *Wrenshall v. Cook*, 7 Watts. 464; *Smith v. Myler*, 22 Pa. St. 36. In Iowa, under a statute declaring partnership debts to be joint and several, it has been decided that in an action against an individual defendant to foreclose a mortgage, he may set off an account due to a firm of which he is a member: *Allen v. Maddox*, 40 Iowa, 124. Where a number of persons sue jointly, but where each must recover a distinct and

definite part of the judgment, it has been held that the defendant may plead individual set-offs against the amount of each plaintiff's demand: *Taylor v. Root*, 4 Abb. App. Dec. 382.

WHERE ONLY ONE DEFENDANT IS SERVED in an action against two upon a promissory note, it has been held that notes of the plaintiff indorsed to the defendant served may be used as set-offs: *Snow v. Conant*, 8 Vt. 301. So, where the notes were indorsed to both defendants: *Mott v. Mott*, 5 Vt. 111. But the defendant served cannot set off a debt due to the defendant not served: *Henderson v. Lewis*, 11 Am. Dec. 733.

PAYMENT TO A PARTNER is payment to the firm: *Parsons on Partnership*, 172, n. (w.); *Major v. Hawkes*, 12 Ill. 299. So, after dissolution, where there is an agreement among the partners, of which the debtor has notice, that a certain one of them is to settle up the affairs: *Parsons on Partnership*, 396; *Gordon v. Freeman*, 11 Ill. 14. But a note taken by a partner in his own name for a firm debt does not bind the firm: *Granger v. McGilvra*, 24 Ill. 152.

NOMAUQUE v. PEOPLE.

[BREWER, 145.]

AN INDICTMENT NOT INDORSED "a true bill," with the name of the foreman of the grand jury signed to such indorsement, as prescribed by statute, is a nullity.

ALLOWING JURORS TO SEPARATE.—The jurors in a criminal case should not be permitted to go at large after they are sworn until they are finally discharged.

BIAS OF JURORS AS GROUND FOR NEW TRIAL.—The fact that one of the jurors in a criminal case had made up his mind against the prisoner, though he swore that he had formed no opinion, if discovered and shown by affidavit after the trial, will furnish ground for a new trial.

THE JURY MUST BE PRESENT when their verdict is delivered in court, in order that the prisoner may have them polled, and the verdict is not final until pronounced and recorded.

NO IRREGULARITIES ARE WAIVED IN A CAPITAL CASE, for the prisoner is considered as standing on all his rights. Hence, if by agreement between his counsel and the prosecutor the jury return their verdict to the clerk, and it is delivered in court in their absence, the prisoner is entitled to a new trial, notwithstanding such agreement.

ERROR. The opinion states the case.

Starr and Blackwell, for the plaintiff in error.

James Turney, attorney-general, for the people

By Court, SMITH, J. It appears from the record that the plaintiff in error was tried at a circuit court at the November term, 1825, in the county of Peoria, on a charge of having murdered a man by the name of Pierre Londri. From an inspection of the record it also appears that the indictment as

set forth was never found by the grand jury of that county; no finding of any kind is made on the bill. It further appears that on the fifteenth of October, 1825, being the day of the commencement of the trial, nine of the petty jurors were impaneled and sworn, and permitted to go at large until the next day, when the panel was completed. After the trial had closed, an agreement in the following words was entered into between the public prosecutor and the prisoner's counsel, viz.: "It is agreed by the attorney-general and the counsel for the defendant, that if in case the jury should agree on their verdict between this and to-morrow morning, that they may deliver their verdict to the clerk." In pursuance of this agreement the clerk, on the morning of the eighteenth of October, 1825, as the recorder recites, presented to the court the following verdict, which had been handed him by the jury, viz.: State of Illinois, Peoria county circuit court, November term, 1825. We, the traverse jury, in and for the county aforesaid, do find Nomaque, an Indian of the Pottawattomie tribe, guilty of the murder of Pierre Londri, November 17, 1825.

A motion was thereupon made for a new trial, on the ground of the partiality of Dumont, one of the jurors, who, as is established by the oath of two persons, declared before he was sworn on the jury that Nomaque was a damned rascal, and all those who took his part, and he would give five dollars to H. M. Curry to appear and assist to convict Nomaque of the crime charged, and pay it in surveying, or hunting land. The court below refused to grant a new trial, and an exception was taken to that decision. There are other objections which were made on the trial of the cause, but as they are not deemed important we pass them by. No exception is taken in this court to the manner in which the proceedings come before the court, nor do we mean to say that any valid one could have been stated or urged. From the preceding statement, which embraces substantially all the facts of importance in the case, the points which present themselves for consideration are, first, whether the prisoner could have been legally tried at all in the court below, it not appearing that there had been a finding of the grand jury, on the paper purporting to be an indictment; and whether he can now avail himself of the objection in this court, the question appearing not to have been made in the court below. Secondly, whether permitting the nine jurors impaneled and sworn, on the first day of the trial, to separate and go at large before the trial, would have formed sufficient

cause for the circuit court to have arrested the judgment, or granted a new trial. Thirdly, whether the evidence offered to show that Dumont had, previously to the trial, expressed his belief of the guilt of the prisoner, or of his hatred to him, and was therefore not an impartial juror, was sufficient to establish either point, and authorize a new trial. Fourthly, whether the consent that the jury might deliver their verdict to the clerk, could have been legally made by the prisoner's counsel; and whether that agreement dispensed with the personal appearance of the jury, and the rendering of their verdict in open court.

On the first point we are of opinion that it was necessary, in order to give the court the right to try the prisoner, that the grand jury should have indorsed their finding on the bill of indictment, verified by the signature of their foreman. This was indispensable, and as it appears not to have been done, the proceedings were *coram non judice*. This objection going to the power of the court to try the prisoner on the indictment, may, although not noticed or urged below, be now urged as a cause of error.

On the second point we give no positive opinion, but it certainly was an act of great indiscretion in the court to permit the jurors to go at large after they were sworn, because the reason of the rule, in keeping jurors together and apart from every other person, is as applicable after they are chosen and sworn, and before the trial, as after they are charged with the prisoner. The object certainly is to keep them from receiving any other impressions in regard to the prisoner than those which shall be made by the testimony given on the trial; if suffered to go at large at any time after they are elected to try the prisoner, the object might be wholly defeated.

As to the third point, it is very apparent that the prisoner has been tried by one who, so far from standing perfectly indifferent between the parties, as the law emphatically requires, was in a condition the very opposite. The state of his mind must have led him to look on the testimony against the prisoner with every view to a conviction, and his feelings, it would seem, could alone have been pacified with the surrender to him by his fellow-jurors of his victim. We are therefore constrained to say, that the circuit court ought to have awarded a new trial on the production of the affidavits, as they show sufficient grounds discovered after the trial.

The fourth point is, we think, easily settled. The prisoner, in a capital case, must be considered as standing on all his

rights. He cannot be considered as waiving anything, could his counsel do it for him. They possessed neither the power nor the right, and if ever there was a case in which an observance of the rule should be required, the present is one. The case of *The People v. McKay*, 18 Johns. 212, is conclusive on this point. The supreme court of New York, in that case, say that a paper purporting to be a venire, but without the seal of the court, is a nullity, and they declared that the prisoner in that case, who had been convicted of murder, and although he had challenged some of the jurors who had been summoned under the supposed venire, did not thereby waive his right to object to the want of a venire. It is further said in that case, "that it is a humane principle applicable to criminal cases, and especially when life is in question, to consider the prisoner as standing on all his rights and waiving nothing on the score of irregularity;" and in that very case, the judge who delivered the opinion of the court relates a case analogous to the present.

In Ontario county, New York, in 1814, a woman of color was indicted, tried, and found guilty of murder. The jury had separated after agreeing on a verdict, and before they came into court, and on that ground a new trial was granted, and she was tried again. On the present occasion this precise point is not necessary to be decided. The agreement extends no farther than to depositing the verdict with the clerk. It did not dispense with the personal appearance of all the jurors in court, and a rendition of the verdict by them. It can only be considered as authorizing the jury to separate when they agreed on their verdict until the next day, for their personal convenience. The prisoner had a right to have the jurors polled; this right could not have been exercised where the presence of the jurors was dispensed with. For a confirmation of the soundness of this doctrine, see the case of *Blackley v. Sheldon*, 7 Johns. 32, and 6 Id. 68. *Root v. Sherwood*, where it is said, "a verdict is not valid and final, until pronounced and recorded in open court; and before it is recorded, the jury may vary from their first offering of their verdict, and the verdict which is recorded shall stand; and if the parties agree that a jury may deliver a sealed verdict, it does not take away the right of either to a public verdict." If this be law in a civil case, is it not important, under our system of jurisprudence, that it should be adhered to in a criminal case affecting life? In the present case the verdict was not even sealed; it was liable to alteration, and besides, the court had no legal evidence that it was the verdict of the jury.

While on this part of the case, the court feel it their indispensable duty to reprobate the tolerance of a practice which might lead to the most dangerous consequences, in a case affecting the life of an individual, and to express their disapprobation of it, in the present instance.

The judgment of the circuit court of Peoria must be reversed, and a *supersedeas* awarded; and as a flagrant crime has no doubt been committed, and possibly by the prisoner, and in order that public justice may not be evaded, the court make this additional order, that the prisoner remain in custody for thirty days from this day (twenty-first of December instant), in order to enable the local authorities to take measures to bring him again to trial.

Judgment reversed.

DISQUALIFICATION OF JUROR AS GROUND FOR NEW TRIAL.—See, on this point, the note to *Rollins v. Ames*, 9 Am. Dec. 81.

RIGHT OF POLLING JURY.—See *State v. Allen*, 10 Am. Dec. 687, and note thereto.

COLES v. COUNTY OF MADISON.

[BREWER, 154.]

RETROSPECTIVE STATUTE.—An act of the legislature releasing a penalty accruing to a county, after verdict and before judgment, is constitutional, being neither an *ex post facto* law, nor a law impairing the obligation of contracts, and it may be pleaded *puis darrein continuance*.

COUNTIES ARE PUBLIC CORPORATIONS subject to complete legislative control.

ERROR. The case is stated in the opinion.

Starr, for the plaintiff in error.

Turney and Reynolds, for the defendant in error.

By Court, WILSON, C. J. This is an action of debt brought by the county commissioners of Madison county, for the use of the county, against Edward Coles, for two thousand dollars, as a penalty for bringing into the county and setting at liberty ten negro slaves, without giving a bond, as required by an act of the legislature of 1819. To this action, Coles pleaded the statute of limitations, which plea was demurred to, and the demurrer sustained by the court, and the parties went to trial upon the issue of *nil debet*. A verdict was found against Coles, at the September term, 1824, of the Madison cir-

cuit court, but no judgment was rendered upon it till September, 1825, the cause having been continued till that time, under advisement, upon a motion for a new trial. In January, 1825, the legislature passed an act releasing all penalties incurred under the act of 1819, including those sued for, upon which Coles was prosecuted.

This act Coles pleaded *puis darrein continuance*, and renewed the motion for a new trial, but the court overruled the motion and rejected the plea, and rendered judgment for the plaintiffs. There are several causes assigned for error, but the one principally relied upon is, that the court rejected the defendant's plea, as a bar to the further prosecution of the suit, alleging a compliance on his part with the act of January, 1825. The only question for the decision of the court, from this statement of the case is, was the legislature competent to release the plaintiff in error from the penalty imposed for a violation of the act of 1819, after suit brought, but before judgment rendered? or, in other words, could they, by a repeal of the act imposing the penalty, bar a recovery of it? If the legislature cannot pass an act of this description, it must be because it would be in violation of the constitution of the United States, and which has in substance been adopted into ours, which denies to the state legislatures the right to pass an *ex post facto* law, or law impairing the obligation of contracts. This is the only provision in that instrument that has any bearing upon the present question. Is the law of 1825, then, an *ex post facto* law, or does it impair the obligation of a contract? The term *ex post facto* is technical, and must be construed according to its legal import, as understood and used by the most approved writers upon law and government. Judge Blackstone says, "an *ex post facto* law is where, after an action, indifferent in itself, is committed, the legislature then, for the first time, declare it to have been a crime, and inflict a punishment upon the person who committed it." This definition is familiar to every lawyer, and I am not aware of any case in either the English or American courts in which its correctness is denied.

It appears from the Federalist, a work which has been emphatically styled the text-book of the constitution, that the term was understood and used in this sense by the framers of that instrument. The authors of this work were among the ablest statesmen and civilians of the age—two of them were members of the convention that framed the constitution, and

would not have been mistaken in the meaning of the terms used in it. Judge Tucker, in his notes on the Commentaries of Blackstone, also adopts it as the true one, and it is evident from the tenor of his comments upon the principles contained in that work that if there had been any doubt of the correctness of this one, that it would not have been passed in silence, much less would it have received his approbation. But that the term *ex post facto* is applicable only to laws relating to crimes, pains and penalties, does not rest upon the bare acquiescence of the courts, or the authority of elementary writers. It has received a judicial exposition by the highest tribunal in the nation. The decision of the supreme court of the United States, in the case of *Calder and wife v. Bull and wife*, 3 Dallas, 386, must be considered as having put this question to rest. The point decided in that case was, as to the validity of an act of the legislature of Connecticut, which had a retrospective operation, but which did not relate to crimes. All the state courts through which that case passed decided in favor of the validity of the law. It was then taken up to the supreme court of the United States, where the judgment was affirmed. The court was clearly of opinion that the prohibition in the United States constitution was confined to laws relating to crimes, pains, and penalties. Judge Chase, in delivering his opinion, says, "every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited by the constitution." Patterson, Justice, said, "he had an ardent desire to have extended the provision in the constitution to retrospective laws in general," and concludes his remarks by saying, "but on full consideration I am convinced that *ex post facto* laws must be limited in the manner already expressed." Sergeant's Constitutional Law, 347. No higher evidence, I believe, can be adduced of the existence of any principle of law, than is afforded by these authorities, that the law under consideration is not an *ex post facto* one. It is considered that it is retrospective, and that as a general principle of legislation it is unwise to enact such laws; yet it is not the province of a court to declare them void. No prohibition to the exercise of such a power by the legislature is contained in the constitution of the United States or of this state, and it is an incontrovertible principle that all powers which are not denied them by one or other of those instruments are granted. The next inquiry is, does this law violate the obligation of a contract? This question is easily answered.

A contract is an agreement between two or more to do, or not to do, a particular thing; nothing like this appears in the present case. If a judgment had been obtained, the law might, by implication, raise a contract between the parties; but until judgment the defendant is regarded as a tortfeasor, he is prosecuted upon a penal statute for a tort; the action would die with him, which would not happen in the case of a contract. It is idle, therefore, to talk of a contract between the plaintiff and defendant, and it is only between the contracting parties that the legislature is prohibited from interfering. But in this case there is no contract between any parties, and all reasoning founded upon the idea of a contract is nugatory. But it is said the legislature could not pass this law, because the plaintiffs have acquired a vested interest in the penalty, by commencing suit, which could not be taken away.

The authorities relied upon to support this position are not apposite. The decisions in those cases turned on the construction of the laws, and not on the authority of the legislature to pass them. In the case of *Coleman v. Shower*, 2 Show., which was an action brought after the passage of the statute of frauds and perjuries, upon a marriage promise made by parol, the judges said they believed the intention of the makers of that statute was only to provide for the future, and not to annul parol promises which were good and valid in law at the time they were made. In the case of *Couch qui tam v. Jeffries*, 4 Burr. 2460, Lord Mansfield placed his opinion on the intention of the legislature, which, he believed, was not to do injustice to the plaintiff by subjecting him to costs. So, too, in *Dash v. Van Kleeck*, 7 Johns. 577 [5 Am. Dec. 291], the same ground was assumed. The court did not intend to decide that the legislature could not pass a retrospective law, but that the one under consideration was not necessarily retrospective, and therefore ought not to receive that construction. In this opinion, the court was divided three to two. But had the plaintiffs a vested interest in the penalty before judgment? A vested right is one perfect in itself, and which does not depend upon a contingency or the commencement of suit. Suit is the means of enforcing or acquiring possession of a previously vested interest, but the commencement of a suit does not of itself, even in a *qui tam* or popular action, vest a right in the penalty sued for. The only consequence that results from the commencement of a popular action is, that it prevents another person from suing, and the executive from releasing the penalty:

Blackstone, vol. 2, p. 442, in speaking of the means of vesting a right in chattel interests, says: "And here we must be careful to distinguish between property, the right of which is before vested in the party, and of which only possession is recovered by suit or action, and property to which a man before had no determinate title or certain claim, but he gains as well the right as the possession, by the process and judgment of the law. Of the former sort, are debts and choses in action." In these cases the right is vested in the creditor by virtue of the contract, and the law only gives him a remedy to enforce it. "But," he continues, "there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law, where before judgment had, no one can say he has any absolute property, either in possession or in action; of this sort are first, such penalties as are given by particular statutes to be recovered in an action popular." Here is an authority directly in point.

In the present case no judgment had been rendered previous to the passage of the law releasing the penalty, consequently no right to the penalty had vested in the plaintiffs which this law directs. The right which the plaintiffs had acquired by the commencement of the suit, was, according to Blackstone, "an imperfect, inchoate degree of property" which required the judgment of the court to consummate and render it a vested right. Before judgment in a popular action, the property in the penalty is imperfect and contingent, liable to be destroyed by a repeal of the statute upon which suit is brought. This principle is settled in a variety of cases; in that of *Seaton v. The United States*, 5 Cranch. 283, Judge Marshall, in delivering the opinion of the court, says: "That it has been long settled upon general principles, that after the expiration or repeal of a law, no penalty can be imposed or punishment inflicted for violations of the law committed while it is in force." The same point was decided in the case of the *Schooner Rachael v. The United States*, 6 Cranch, 329; and in the case of *The United States v. Ship Helen*, 6 Cranch, 203, the doctrine is fully settled, that even after judgment of condemnation *in rem*. for a breach of the embargo laws, provided the party appeals, or obtains a writ of error, he may avail himself of a statute repealing the penalty enacted subsequently to such condemnation. In the *People v. Coleman*, the court unanimously awarded a new trial in order that the defendant might avail himself of a defense

given by a statute passed subsequent to the commission of the offense; and that in the case of the *Commonwealth v. Duane*, 1 Binn. 601 [2 Am. Dec. 497], the defendant had been indicted at common law for a libel, after a verdict and before judgment the legislature passed a law that "after the passage of this act no person shall be prosecuted criminally for a libel." The supreme court refused to give judgment on the verdict. The terms of this act were not retrospective, yet the court considered it so, and must necessarily have acknowledged the power of the legislature to pass such laws: See, also, Sergeant's Constitutional Law, 348; 1 Cranch, 109; and 3 Dall. 279. These cases require no comment. They are directly on the point under consideration and have settled the doctrine that a repeal of a law imposing a penalty, after a verdict for the penalty, is a bar to a judgment on the verdict. The court has no longer any jurisdiction of the case. There is no law in force upon which they can pronounce judgment. If then, the legislature can, by a total repeal of the law of 1819, defeat a recovery for an infraction of it before judgment, can they not by the act of 1825, release all penalties incurred anterior to its passage? There is no rule of law which denies them the power of doing that indirectly which they may do directly. In effect and in principle there is no difference, and the power to do the greater act includes the less.

It is said that the king cannot remit an informer's interest in a popular action after suit brought; this is no doubt true, but it is equally true that the parliament can. It is not pretended that the executive could remit the penalty in this case, but that the legislature may. Neither the constitution of the United States nor of this state contain any prohibition to the exercise of such a power by the legislature, and their powers have no limits beyond what are imposed by one or other of those instruments, nor is it necessary that they should. They form an ample barrier against tyranny and oppression in every department of the government, and secure to the citizens every right in as perfect a manner as is compatible with a state of government. If they should, by mistake, or from any other cause, attempt the exercise of a power incompatible with the constitution, the obligation of a court to resist it is imperative. But it is not in doubtful cases, or upon slight implications that the court should pronounce the legislature to have transcended their powers. In the present case, I am clearly of opinion they have not done so. The law under consideration is not an

ex post facto law, because the generally received and well settled import of the term is not applicable to a law of this character. It impairs the obligations of no contract, for the conclusive reason that no contract ever existed, and for the same reason it cannot be said to destroy a vested right: 2 Dall. 304; 1 Cranch, 109.

The objection that this law works injustice to the county is not well founded. All the rights of the county contemplated to be secured by the law of 1819 are secured by this. The object of the law of 1819 was to compel persons bringing slaves into this state for the purpose of emancipation to give bond for their maintenance. This law requires the bond to be given, which has been done, and all costs of suit and damages incurred in any case to be paid, which the defendant has also offered to do in this case. The county, then, is secured, not only against prospective injury, but against all damages heretofore sustained. There is no ground of complaint, then, on the part of the county. They are secured in their rights and lose nothing. In another point of view which the case is susceptible of, I am satisfied that the law under consideration is not unconstitutional. On an inquiry into the different kinds of corporations, their uses and objects, it will appear that a plain line of distinction exists between such as are of a private and such as are of a public nature, and form a part of the general police of the state. Those that are of a private nature and not general to the whole community the legislature cannot interfere with. The grant of incorporation is a contract. But all public incorporations which are established as a part of the police of the state are subject to legislative control, and may be changed, modified, enlarged, restrained, or repealed to suit the ever varying exigencies of the state. Counties are corporations of this character, and are consequently subject to legislative control.

Were it otherwise, the object of their incorporation would be defeated. It cannot be doubted that Madison county, as a county, might be stricken out of existence, and her interest in a popular action thereby defeated. Upon what principle, then, can it be contended that the legislature cannot remit a penalty in a popular action brought for her benefit? Every view I have been able to take of this interesting and important subject leads to the conclusion that the legislature have the constitutional power to pass the act of 1825, releasing Coles, upon the terms prescribed in that act.

The judgment of the court below must be reversed, and the

proceedings remanded, with directions to the circuit court to receive the defendant's plea upon his paying costs, etc.

Judgment reversed.

RETROSPECTIVE LAWS.—The law relating to the validity of retrospective statutes generally is discussed and the authorities examined in the note to *Goshen v. Stonington*, 10 Am. Dec. 131; see, also, *Dash v. Van Kleeck*, 5 Id. 291, and note; *Bedford v. Shilling*, 8 Id. 718; *Merrill v. Sherburne*, Id. 52; *Dickinson v. Dickinson*, 9 Id. 608.

BAKER v. WHITESIDES.

[BAKER, 174.]

PAROL VARIANCE OF WRITTEN AGREEMENT.—The time of performance of a written agreement may be extended by parol though the terms cannot be changed.

WAIVER OF STRICT PERFORMANCE.—Where a contract for the conveyance of land does not specify any particular time of performance, but stipulates that the deed shall be made when the money is paid, if the vendee pays the money and neglects to demand a conveyance, or on the vendor's offer to convey, refuses to accept, and says that he will call for the deed when he wants it, the vendor's failure to convey at the time of payment is thereby waived.

APPEAL. The opinion states the case.

Starr, for the appellant.

Cowles, for the appellee.

By Court, WILSON, C. J. This is an appeal from the Madison circuit court, in an action of covenant on a writing obligatory, executed by S. Whiteside to A. Baker, in the penalty of two hundred dollars, that if he, the said Baker, should pay to the said Whiteside one hundred and twenty-five dollars on or before the first day of October next ensuing, he, the said Whiteside, would execute and deliver to the said Baker a deed in fee-simple for a lot in the town of Edwardsville. Baker avers in his declaration that he did pay the sum of one hundred and twenty-five dollars, according to agreement; nevertheless, the said Whiteside did not, on the first day of October, or at any time before or since, execute and deliver to the said Baker a good and sufficient deed, although often requested so to do. To this declaration the defendant pleaded two pleas:

1. That the plaintiff made no demand of the said defendant for the deed specified, and that the said defendant was always

ready and willing to execute the same; 2. That the said defendant offered to make the deed according to his covenant, and the said plaintiff objected, and said, when he wished the deed he would apply for it.

Both these pleas are demurred to, and the question presented for our determination is, whether or not the court below erred in overruling the demurrers.

As the second plea presents the strongest ground of defense, we will consider it first. If it is a correct principle of law, and that it is the court is fully satisfied, that he who prevents a thing from being done, shall not avail himself of the non-performance he has occasioned, the demurrer was correctly overruled. The plaintiff's conduct can be considered in no other light than a waiver of the condition of the bond so far as related to the time of its performance. As a general rule it is true, that the terms of a written agreement cannot be changed by parol, but that the time of its performance may be extended, is settled by a variety of cases; that of *Keating v. Price*, 1 Johns. Cas. 22 [1 Am. Dec. 92], is directly in point. In that case, the defendant promised in writing to deliver a quantity of stoves on or before the first day of May, 1796. The defendant, on the trial, proved that in January, 1796, the plaintiff agreed to extend the time until the spring following. The court said, that an extension of time may often be essential to the performance of contracts, and there can be no reason why a subsequent agreement for that purpose should not be valid, and proved by parol evidence.

The first plea, the court is of opinion, is also good. According to the true construction of the contract, no time is fixed for executing and delivering the deed; a demand by the plaintiff was therefore necessary, and as no such demand is averred specially, the demurrer to the plea was correctly overruled. The judgment of the court below is affirmed, and the cause remanded, with leave to the plaintiff to withdraw his demurrer, and take issue on the pleas filed.

Judgment affirmed.

PAROL EVIDENCE AFFECTING WRITTEN CONTRACT.—Upon the general subject of the admissibility of parol evidence affecting deeds and other written contracts, see *Bull v. Talbot*, 1 Am. Dec. 62; *Thompson v. White*, Id. 252, and note; *O'Neale v. Lodge*, Id. 377; *Schemerhorn v. Vanderheyden*, 3 Id. 203, note; *McFarlane v. Moore*, Id. 752; *Coger v. McGee*, 5 Id. 610; *Sneed v. Hooper*, Id. 691; *Stackpole v. Arnold*, 6 Id. 150; *Snyder v. Snyder*, Id. 493; *Gatlin v. Gilpatrick*, Id. 557; *Flint v. Sheldon*, 7 Id. 162; *Stevens v. Cooper*, Id. 499; *Barber v. Brace*, 8 Id. 149; *Claremont v. Carlton*, 9 Id. 88; *South Carolina Soc. v. Johnson*, 10 Id. 644; *Harvey v. Alexander*, Id. 519; *Bowen*

v. Bell, 11 Id. 286; *Grier v. Huston*, Id. 627; *Graves v. Carter*, Id. 786 and note. The doctrine of the principal case on this point is approved in *Wadsworth v. Thompson*, 3 Gilm. 423; *Penny v. Graves*, 12 Ill. 289, and *Hunter v. Bilyeu*, 30 Id. 228. In the case last cited it was held that for the purpose of correcting a mistake in a written contract a court of equity would admit parol evidence to show what the contract really was. To the same effect is *Coger v. McGee*, 5 Am. Dec. 610.

PLEA OF READINESS TO PERFORM.—In a case of independent covenants it was held in *Buckmaster v. Grundy*, 1 Scam. 310, that a plea of readiness to perform without an averment of offer to perform was bad, and would not excuse a non-performance.

FLACK v. HARRINGTON.

[RECESS, 213.]

A MAGISTRATE IS LIABLE IN TRESPASS for issuing a warrant of arrest officiously, without a complaint on oath or personal knowledge that a crime has been committed.

ERROR. Action of trespass, assault and battery, and false imprisonment brought against Flack, a justice, for issuing a certain warrant of arrest, and against one Johnson deputed to serve said warrant.

The declaration was in two counts, and in substance, charged that Flack, as justice, irregularly and illegally issued a warrant for the arrest of the plaintiff for an alleged breach of the peace, without any complaint on oath or personal knowledge of the alleged offense and without reasonable or lawful cause to suspect the plaintiff's guilt of the same, and that the said Johnson upon the advice and request of Flack, arrested the plaintiff on said warrant. A demurrer to the declaration having been overruled, the defendants severally pleaded "not guilty," and the said Johnson pleaded, also, a special plea in justification. Johnson was acquitted and Flack was convicted, and judgment given against him whereupon he brought error to reverse the same.

Cowles, for the plaintiff in error.

Eddy, for the defendant in error.

By Court, Lockwood, J. This case is clearly distinguishable from the case of *Flack and Johnson v. Ankeny*, decided this term. The allegation here is, that Flack officiously, and without any complaint on oath, issued his warrant for the apprehension of Harrington. And these allegations are found true by the verdict of a jury upon a plea putting the facts directly in issue.

Will the law tolerate such conduct in its officers? This is clearly not a case of error in judgment in a case legally before the justice.

In fact, there was nothing before the justice to authorize him to act at all, for he made the case and then adapted his process to the assumed facts. A justice in issuing a warrant for the apprehension of a person for a criminal offense, acts ministerially, and cannot of his mere motion, institute such a proceeding, unless in particular cases, where he is present at the commission of the offense.

If he voluntarily acts, he is liable to an action, and trespass will lie. The law appears to be well settled on this point, as will appear from the following authorities. In Swift's digest, page 800, the law on this subject is stated as follows:

If a justice of the peace, without complaint or information, should issue a warrant, and cause a person to be arrested, trespass would lie against him, for though he is excused when he issues a warrant on a false accusation, yet it is otherwise where he issues his warrant, without accusation. Swift cites Cro. El. 130. In the case of *Wallsworth v. M'Cullough*, 10 Johns. 93, this was an action of false imprisonment; on the trial the following facts appeared: That the plaintiff was arrested by virtue of a warrant issued by defendant as a justice of the peace, on the complaint of the overseers of the poor, setting forth the examination of the mother, etc. The overseers, however, testified that they never made complaint, nor did they request the justice to issue the warrant.

They also stated that one Garby was occasionally employed by them to do their business, but they had not employed him in this case, and on whose application the warrant had actually issued. The overseers appeared before the justice on the examination, and agreed to the proceedings. The warrant issued without authority, because it was not issued upon the complaint of the overseers of the poor, or either of them. The justice acting ministerially in this case, was responsible for issuing the warrant without the application required by the statute. The subsequent consent of one of the overseers that the proceedings might go on, would not deprive the plaintiff of the action for the previous arrest, upon a warrant irregularly issued. And the same court in the case of *Jones v. Percival*, 2 Johns. Cas. 49, held: "Trespass for a false imprisonment lies against a justice of peace who voluntarily and without the request or authority of the plaintiff in an action before him, issues

an execution against the body of the defendant who is privileged from imprisonment, who claims his privilege, and is taken on the execution." The errors assigned are altogether technical, and relate to form, and do not appear to require any examination. The judgment must be affirmed with costs.

Judgment affirmed.

JUDICIAL LIABILITY.—For an examination of the law relating to this subject, see the note to *Yates v. Lansing*, 6 Am. Dec. 303.

MELICK v. DE SEELHORST.

[BREWER, 221.]

ANY EVIDENCE OF A NEW PROMISE to take a case out of the statute of limitations should be left to the jury, with proper instructions as to the law.

AN UNQUALIFIED PROMISE TO PAY A BARRED DEBT will take it out of the statute, and if there be a qualification, the plaintiff must do away with it by proof.

AN ACKNOWLEDGMENT OF THE DEBT as still subsisting, or a part payment of it, is sufficient evidence from which to infer a new promise.

ERROR. The opinion states the case.

Cowles, for the plaintiff in error.

McRoberts, for the defendant in error.

By Court, LOCKWOOD, J. This was an action of assumpsit brought in the Madison circuit court. The plaintiff below declared on a promissory note, to which the defendant pleaded the statute of limitations, and the plaintiff replied a promise within five years. On the trial of the cause, after the plaintiff had adduced his proof, the court directed the jury "to return a verdict for the defendant." To this opinion the plaintiff excepted, and the cause is brought into this court by writ of error. Several errors have been assigned, but the court only deem it necessary to notice one of them, and that is, whether the court ought not to have permitted the evidence to go to the jury without the direction. On this point we are of opinion that the circuit court erred in not permitting the evidence to go to the jury, with instructions as to the law arising on the case, and then left the jury to decide whether the proof came within the rule.

The case of *Lloyd v. Maund*, 3 T. R. 760, is an authority to

show that the evidence ought to have been left to the jury. As it will be necessary for this cause to go to another jury, the court feel themselves called upon to lay down what they consider the best construction of the statute of limitations in relation to the cases taken out of its operation.

In doing so, however, the court labor under much embarrassment from the great number of conflicting decisions that are to be found in the books of reports. These decisions are of so irreconcilable a character that this court are at liberty to extract from all the cases such rules as will, in their opinion, most conduce towards effecting the intentions of the legislature in passing the law. An unqualified promise to pay the debt, has, by all the decisions, been held sufficient to take the case out of the statute. Where the promise to pay is accompanied with a qualification, or upon a contingency, the court are of opinion that the proof rests upon the plaintiff to do away the qualification, or show that the contingency has happened. Where the acknowledgment of the party is that the demand is still due and subsisting against him, this will be sufficient to infer a promise to pay. So, also proof of an actual payment of part of the debt, by the party, or his authorized agent, will also be sufficient evidence for the jury to infer a promise to pay the balance. The court give no opinion whether the evidence contained in the bill of exceptions was sufficient for the plaintiff to recover. If a party wishes to refer the evidence to the court, it ought to be done by a demurrer to evidence.

The judgment is reversed with costs, and the cause remanded to the circuit court, and a *venire facias de novo* awarded in that court.

Judgment reversed.

AS TO WHAT ACKNOWLEDGMENTS and promises are sufficient to remove the bar of the statute of limitations, see *Bell v. Rowland*, 3 Am. Dec. 729; *Danforth v. Culver*, 6 Id. 361; *Jones v. Moore*, Id. 423 (a promise made to an executor); *Lord v. Shaler*, 8 Id. 160, and note; *Seaward v. Lord*, 10 Id. 50; *Burden v. McElhenny*, 10 Id. 570, and note; *Murray v. Coster*, 11 Id. 333; *Ludlow v. Van Camp*, Id. 529, and note (where the promise was to pay a barred debt on bond and was held insufficient); *Fries v. Boisselet*, Id. 683; *Cobham v. Administrators*, 2 Id. 612 (a promise by an administrator).

A CONDITIONAL PROMISE, where the condition has not been performed, is insufficient. On this point the doctrine of the principal case is approved in *Keener v. Crull*, 19 Ill. 189; and *Dickerson v. Sutton*, 40 Id. 403. To the same effect is *Mullett v. Shrumph*, 27 Id. 107; see, also, *Wooters v. King*, 54 Id. 243, as to what is necessary to constitute a sufficient acknowledgment or new promise.

ANKENY v. PIERCE.

(BRIDGE, 289.)

A NOTE IS NOT EVIDENCE OF A SETTLEMENT of all demands between the parties prior to its date.

APPEAL. The opinion states the case

Cowles, for the appellant.

Baker, for the appellees.

By Court, Lockwood, J. Pierce and Ankeny in the Jackson circuit court, on a promissory note. The defendant below pleaded judgment, and on the trial of the cause, proved an account for goods sold and delivered previous to the execution of the note.

Whereupon the plaintiff below moved the court to instruct the jury "that the execution of the note sued on was evidence of a settlement of all demands due from plaintiff below to defendant below, up to the date of the note, unless the defendant had shown, by evidence, that the demands were not settled at the execution of the note;" which instructions the court gave, and the defendant below excepted, and brought the cause into this court by appeal. The only question presented to this court for its decision is, whether the instruction prayed for ought to have been given. In a case where the only proof exists in the production of a note on the one side, and evidence of an account anterior to the date of the note on the other side; it is very difficult for the court to lay down with precision any general rule applicable to such cases. The court have not been referred to any adjudged cases, or any principle of law analogous to such a state of facts, nor have they been able to find any authority on the subject. The court, therefore, in the absence of authority, must decide this question agreeably to the dictates of justice and common sense. A knowledge of the manner in which men generally transact their business is necessary in arriving at a correct conclusion to the question presented in this case. Experience informs us that notes are frequently given as the consideration of a particular trade, without any reference to the situation of accounts between the parties leaving them to be settled at some future time, or in some particular manner. And notes, also, are given on the settlement of accounts, and for the balance due on such settlement. Are there, then, in the dealings among mankind, sufficient uniformity in relation to the execution of notes, to authorize the court to decide that a legal pre-

sumption is thereby raised that all previous demands are released or settled? The court believe, from their experience and observation, that injustice would too often be done if they should sanction such a general rule.

It is safer to require a party who resists a demand upon the ground that it has been settled or paid, to prove in what manner it was paid. Slight evidence would, doubtless, be sufficient in this case, to warrant a jury in raising a presumption that the account was settled when the note was executed, but without any proof of a settlement of accounts and a balance struck, it is presuming too much to justify the court in deciding "that the execution of the note was evidence of a settlement of all demands due from plaintiff to defendant." The judgment must therefore be reversed with costs in this court, and the cause remanded, with directions to the court below to award a *venire de novo*.

Judgment reversed.

NOTE AS EVIDENCE OF SETTLEMENT.—The doctrine here established that a note is not evidence of settlement of prior accounts and dealings between the parties is not that which generally prevails. The general rule on this subject is thus stated in Daniel on Neg. Inst. sec. 71: "Proof of the giving of a promissory note by one person to another, nothing else appearing, is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker, at the date of the note, was indebted to the payee upon such settlement to the amount of such note. But this is a mere presumption which may be repelled by proofs of the consideration of such note, and of the occasion and circumstances attending the giving of the same." Mr. Daniel cites several New York cases in support of this principle: *Lake v. Tyson*, 6 N. Y. 461; *De Freest v. Bloomingdale*, 5 Denio, 304; *Dutcher v. Porter*, 63 Barb. 20; *Sherman v. McIntire*, 14 N. Y. Sup. Ct. (7 Hun.) 592. There are decisions to the same effect in Indiana: *Boffandick v. Raleigh*, 11 Ind. 136; *Gaskin v. Wells*, 15 Id. 253; *Kirchner v. Lewis*, 27 Id. 22; in Iowa: *Smith v. Bissell*, 2 G. Gr. 379; and in Missouri: *Kinman v. Cannefax*, 34 Mo. 147.

The rule laid down in the principal case, however, seems to be firmly established in Illinois. It was fully affirmed in *Crabtree v. Rowand*, 33 Ill. 421. In that case the court below instructed the jury that the giving of a note, if unexplained, was *prima facie* evidence of all prior accounts and demands between the parties, but that it might be rebutted by proof to the contrary. In reviewing these instructions in the appellate court, Walker, C. J., delivering the opinion, said: "If the general course of the business of the country was such that a note was never given, or was not usually given except on a full settlement of all existing accounts between the parties, then the instruction would have been correct. But we know that such is not the business usage of the country. This rule was announced in the case of *Ankeny v. Pierce*, Breese, 226. The court in that case say it is safer to require a party who resists a demand upon the ground that it has been paid, to prove in what manner it has been paid. And that slight evidence would doubtless be sufficient in such a case to warrant a jury in presuming that the account

was settled when the note was executed, but without any proof of a settlement of accounts it is presuming too much to justify the court in deciding that the execution of a note is evidence of a settlement of all accounts between the parties. This decision has not been disturbed, and has been acted upon since it was announced as the correct rule. Nor is any reason perceived why we should change a rule so long acquiesced in, simply to make it conform to more recent decisions of courts of other states. It seems to us to be based upon reason, well calculated to promote justice, and no necessity exists for a change of the rule. The opposite rule would work hardship, if not manifest injustice in many cases."

TYLER v. PEOPLE.

[BROWN, 233.]

LARCENY CANNOT BE COMMITTED OF GOODS FOUND in the highway, bearing no marks by which the owner can be ascertained, for there is no felonious taking.

ERROR. The facts are stated in the opinion.

Gatewood, for the plaintiff in error.

Eddy, *State's attorney*, for the defendant in error.

By Court, BROWN, J. This was an indictment against John Tyler, for a supposed larceny. He was tried and a verdict of guilty found against him in the court below, upon which judgment was rendered; to reverse which, he has brought this writ of error.

The whole of the evidence establishes clearly that the article of property for which he is charged with stealing was found in the highway, and was a pair of saddle-bags. It was further proven, that there were no marks by which the owner could be distinguished.

Larceny is defined by the books to be "the felonious taking, and carrying away of the personal goods of another." The original taking, then, in this case, cannot, by any possible construction that can be given to it, be construed to be with a felonious intent.

The court is, therefore, of opinion, that the judgment of the court below be reversed, and the prisoner set at liberty.

Judgment reversed.

See to the same effect, *People v. Anderson*, 7 Am. Dec. 462. In the note to that case the decisions bearing upon this subject are examined.

CLARK v. PEOPLE.

[BREWER, 340.]

THE POWER TO PUNISH FOR CONTEMPT exists in all courts, independently of the statute, and its exercise rests in the sound discretion of the court, and is not reviewable elsewhere; but if it be used maliciously, or oppressively, the remedy is by indictment or impeachment of the judge or magistrate:

ERROR. The opinion states the case.

McConnel, for the plaintiff in error.

Ford, state's attorney, for the defendant in error.

By Court, SMITH, J. This case is brought up to reverse the decision of the circuit court of Adams county, in dismissing the appeal from the justice of the peace, for want of jurisdiction in the circuit court.

The single point presented by the case is, whether an appeal will lie to the circuit court to re-examine the decision of a justice of the peace in imposing a fine on a party for contempt offered to him while sitting as a justice of the peace, and acting in his official capacity? It is contended in support of the grounds of error assigned by the plaintiff in error, that the appeal from the justice's decision to the circuit court, is warranted by the statute authorizing the taking of appeals from their decision to the circuit court. The thirty-first section of that statute is alone applicable to proceedings in civil cases, and cannot, therefore, embrace a case of the present character, which must be considered as partaking of a criminal nature; nor is it given by the seventh section of the act extending the criminal jurisdiction of justices of the peace, passed in December, 1826, which is confined exclusively to the cases enumerated in that act. It is manifest that neither of the sections referred to give the right to an appeal in a case like the present.

There are other considerations which it may be proper to examine to show that the circuit court does not possess the power to review the decision of the magistrate, either by appeal or in any other form. By the twenty-fourth section of the "act concerning justices of the peace and constables," it is provided "that every person who shall appear before a justice of the peace, when acting as such, or who shall be present at any legal proceedings before a justice, shall demean himself in a decent, orderly and respectful manner, and for failing to do so, such person shall be fined by the justice for contempt in a sum

not more than five dollars." The fine imposed in this case was fixed at three dollars, but in what the contempt consisted does not appear, nor is it deemed material to inquire. It is not pretended that the magistrate has exceeded his powers in any way, nor that the contempt was not committed in his presence. The power, however, to punish for contempt, is an incident to all courts of justice independent of statutory provisions, and the power to enforce the observance of order, punish for contumacy by fine or imprisonment, are powers which may not be dispensed with, because they are necessary to the exercise of all others. The distinction that courts of inferior jurisdiction, not having a general power to fine and imprison for contempt, are restricted to such as are committed in their presence, will not alter the rule in the present case. The exercise of this power must necessarily rest in the sound discretion of the magistrate, and as such, is not the subject of review in the circuit court. To this point a train of numerous decisions may be found, but in a case where it is not pretended that the magistrate has exceeded the powers conferred on him by statute, it is not perceived why this principle should not be strictly applied. The reasoning as to the possible abuse which might grow out of the exercise of the power to punish for contempts, if superior jurisdictions refuse to examine into the correctness of the decision of the magistrate, is readily met by the answer that if he acts maliciously or oppressively, our laws afford an adequate remedy by indictment. We are not, however, without authority on the very point in question, from a tribunal of the highest character in the country. In the case of *Kearney, ex parte*, 7 Wheaton, 88, the supreme court of the United States have said that "they will not grant a habeas corpus where a party has been committed for a contempt by a court having competent jurisdiction; and if granted, they will not inquire into the sufficiency of the cause of commitment." The magistrate having had competent jurisdiction to impose the fine, the circuit court properly refused to inquire into the nature of the contempt, and very properly dismissed the appeal. The judgment of the circuit court is therefore affirmed with costs.

Judgment affirmed.

THAT THE POWER TO PUNISH FOR CONTEMPT IS INHERENT in the very constitution and organization of a court, and necessary, not only to the proper exercise of its important functions, but to its very existence as a court, is a doctrine so obviously sound as hardly to admit of question. Like the right of self-defense in an individual it is an original power existing inde-

pendently of any statute, from the very necessity of the case: 2 Bish. Cr. Law, sec. 243; Sir E. Wilmot's opinion in *King v. Almon*, 8 St. Tr. 53; *Respublica v. Oswald*, 1 Am. Dec. 246; *United States v. Hudson*, 7 Cranch, 32; *Anderson v. Dunn*, 6 Wheat. 204; *State v. White*, T. U. P. Charlt. 136; *United States v. New Bedford Bridge*, 1 Wood & M. 440; *Yates v. Lansing*, 6 Am. Dec. 290; *Mariner v. Dyer*, 2 Greenl. 165; *Morrison v. McDonald*, 21 Me. 550; *State v. Copp*, 15 N. H. 212; *Tenney's case*, 23 Id. 162; *State v. Mathevs*, 37 Id. 450; *Ex parte Adams*, 25 Miss. 883; *Gates v. McDaniel*, 3 Port. 356; *Neel v. State*, 9 Ark. 259; *Cossart v. State*, 14 Id. 538; *State v. Morrill*, 16 Id. 384; *State v. Tipton*, 1 Blackf. 166; *Skiff v. State*, 2 Iowa, 550; *Middlebrook v. State*, 43 Conn. 257; *Stuart v. People*, 3 Scam. 395; *People v. Wilson*, 64 Ill. 195; *State v. Woodfin*, 5 Ire. 199; *Ex parte Robinson*, 19 Wall. 505; 2 Hawk. P. C. sec. 33; *Hammond v. Howell*, 1 Mod. 184. The principle is very clearly and cogently stated by Sir Eardley Wilmot in his opinion in *King v. Almon*, reported in 8 St. Tr. 53. He says: "The power which the courts in Westminster Hall possess of vindicating their own authority is coeval with their foundation and institution. It is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court acted in the face of it: 1 Vent. 1; and the issuing of attachments by the supreme courts of justice in Westminster Hall, for contempts out of court, stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of Magna Charta as the issuing any other legal process whatever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none; it is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in alliance and friendly conjunction with every other provision, which the wisdom of our ancestors has established for the general good of society." The language of Chief Justice McKean, in *Respublica v. Oswald*, 1 Am. Dec. 246, is no less forcible. He thus states the doctrine: "Some doubts were suggested whether even a contempt of the court was punishable by attachment; but not only my brethren and myself, but likewise all the judges of England, think that without this power no court could possibly exist; nay, that no contempt could indeed be committed against us, we should be so truly contemptible, and there is not any period when it can be said to have ceased or discontinued."

THE STATUTES UPON THIS SUBJECT ARE MERELY DECLARATORY of the common law: *United States v. Hudson*, 7 Cr. 32; *Anderson v. Dunn*, 6 Wheat. 204; *People v. Wilson*, 64 Ill. 195; *State v. Morrill*, 16 Ark. 384. Mr. Justice Johnson, in delivering the opinion of the court in *Anderson v. Dunn*, 6 Wheat. 204, says: "It is true that the courts of justice of the United States are vested by express statute provision with power to fine and imprison for contempts; but it does not follow from this circumstance that they would not have exercised that power without the aid of the statute, or not, in case, if such should occur, to which such statute provisions may not extend; on the contrary it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment." And in accordance with the view here expressed it was held in *State v. Morrill*, 16 Ark. 384, that the power to punish for contempts cannot be taken away or abridged by statute, but can only be regulated.

To the same effect is the conclusion of the court in *United States v. New Bedford*, 1 Wood. & M. 440. And in *People v. Wilson*, 64 Ill. 195, it was determined that a statute expressly authorizing courts to punish for contempts committed in their presence did not deprive them of the power to punish for other contempts which tended to the overthrow of their authority and dignity. It seems to have been decided, however, in the case of *Stuart v. People*, 3 Scam. 395, that a statute providing for the punishment of particular contempts deprives the court, especially a justice's court, of power to punish for other contempts, upon the principle of *expressio unius exclusio alterius*. And in *State v. Galloway*, 5 Cold. 326, it was held that where the statute enumerates certain contempts which the court may punish, common law contempts not mentioned in the statute are not punishable. The power of the legislature to abridge the right of courts to punish contempts is recognized also in *Poulson's case*, cited in note to 1 Kent Com. 301; *United States v. Holmes*, 1 Wall. jun. 1. The better opinion would seem to be that the power of the court to punish contempts committed in its immediate presence cannot be taken away by statute, if, as is generally held, such power is inherent in the very organization of the court and essential to its existence. A restriction upon the power of the court in this respect would be necessarily repugnant to the act creating the court, and therefore void. Certainly at least no act abridging this necessary power ought to be construed to extend beyond its express terms. In accordance with this principle it was decided, in *United States v. Holmes*, 1 Wall. jr. 1, that the act of March 2, 1831, prohibiting United States courts from punishing as a contempt the publication of the testimony in a cause pending the trial did not prevent a court from excluding newspaper reporters from its bar during a trial unless they would agree not to publish the testimony until the trial was concluded.

THE POWER OF INFERIOR COURTS TO PUNISH CONTEMPTS, independently of the statute, is denied in some cases. By inferior courts are meant those which are not courts of record; for it is universally conceded that this power is inherent in all tribunals which are courts of record. Three different views seem to be entertained concerning the power of courts not of record to punish for contempts, where such power is not conferred by statute. In one class of cases it is held that such courts do not possess the power at all except by virtue of some statute. In another class the opinion seems to be that the power to punish for contempts *in facie curiæ* is inherent in inferior as in all other courts, but that the power to punish for what may be termed extrajudicial, or out-of-door, contempts exists in courts not of record only when given by statute. In the third class of cases all courts, whether of record or not, are put upon the same footing in this respect, and are held to possess full power without the aid of any statute.

THE CASES DENYING THE POWER TO INFERIOR COURTS altogether, in the absence of any statute upon the subject, proceed upon the assumption that the common law did not esteem such courts safe custodians of an authority so arbitrary, so summary, and so dangerous to the rights of the citizen. In *Brass Crosby's case*, 2 W. Bl. 754, the judges in delivering their opinion incidentally refer to this question, and say: "The law does not repose the same confidence in the judges of these (the inferior courts), as of the superior courts." In a comparatively recent case in New Jersey, the power of courts not of record, such as courts of justices of the peace, and those created to administer the ordinances and by-laws of municipal corporations, to punish for contempts, where such power is not derived from some statute, is emphatically denied: *Matter of Kerrigan*, 33 N. J. L. 344. Bedle, J., deliver-

ing the opinion of the court, uses the following language: "To punish by a commitment for contempt is a power belonging only to judges of certain courts, and does not arise from the mere exercise of judicial functions. The power is great and its exercise without review, where there is jurisdiction, and hence our duty to be careful not to extend it beyond the recognized bounds of the common law. The recorder did not commit in default of sureties to keep the peace, or to answer before the oyer or sessions, but his commitment was in execution by way of punishment. That power so far as it may be exercised by judicial officers, is an incident to a court, belonging alike to courts of civil and criminal jurisdiction, but not extending at the common law below such as are courts of record recognized in the common law." Other cases holding that inferior courts do not possess this power are, *Brooker v. Commonwealth*, 12 Serg. & R. 175; *State v. White*, T. U. P. Charit. 136; *Rutherford v. Holmes*, 66 N. Y. 368; *Morrison v. McDonald*, 21 Me. 550; *Hammond v. Howell*, 1 Mod. 184. On similar principles the power to punish contempts, independently of any statute was denied to a court commissioner in *Haight v. Lucia*, 36 Wis. 355.

THE LIMITATION OF THE POWER TO CONTEMPTS IN COURT, where the court is not one of record, is held in several cases. The ground of the distinction in such cases between in-door and out-door contempts, is that the summary punishment of contempts of the former class is absolutely necessary to the transaction of business in inferior as well as in other courts, while it is not necessary in the case of contempts of the latter class. In accordance with this distinction, it was held in *Lining v. Bentham*, 2 Bay, 1, that a magistrate had power to commit for a contempt in his presence in the execution of his office, but not for a contempt behind his back. To the same effect is *State v. Johnson*, 2 Bay, 385. A similar limitation is held to exist in the case of surrogates' courts in New York: *Matter of Watson*, 3 Lans. 408; *Matter of Watson v. Nelson*, 69 N. Y. 536. In Illinois it has been held that a justice cannot commit a person in the first instance for a contempt, inasmuch as the statute only authorizes such officers to impose a fine of five dollars for such an offense, but that he may imprison the offender for the purpose of enforcing payment of the fine: *Brown v. People*, 19 Ill. 613; *Newton v. Locklin*, 77 Id. 103. These cases, however, do not deny the principle established in *Clark v. People*, that the power to punish for contempts is inherent in justices' courts as well as in those which are of record. They proceed rather upon the assumption that although such power exists it may be regulated and the punishment prescribed by statute. In one case in Pennsylvania it was decided that if a justice possesses the power of punishing for a contempt, he can only exercise it "when he is in the execution of his office in a judicial capacity, and not when he is acting ministerially in allowing a poor rate, or in other similar cases." *Fuller v. Probasco*, 2 P. A. Browne, 137. The court, however, seemed inclined to the opinion that a justice or other inferior magistrate could not punish for a contempt except in cases where the power was given by express statute. In Georgia the power of all courts to punish contempts is greatly restricted by the constitution of the state, as well as by statute: *Harrell v. Ward*, 54 Ga. 649.

BUT THE SOUNDER OPINION is that this power of punishing contempts is possessed equally by all courts, whether of superior or inferior grade, and whether of record or not. The foundation of the power is the obvious necessity that a court should have some summary means of self protection from insult, disorder, and disobedience of its process. And this necessity is just as strong in inferior courts as in those of higher jurisdiction. Indeed, there

would seem to be even greater reason why a justice's court should be able to vindicate its dignity and the orderly progress of its business, by some prompt and efficient punitive power, than for a superior court to possess this authority. Courts of higher grade usually find ample protection from offensive or disrespectful conduct, in the fact that those who preside there have secure shelter in the public esteem in which they are held for their integrity, learning, and ability. Their worth and character enforce respect without resorting to the coercive sanctions of the law. But it is not so with justices' courts. Their weakness and obscurity, and the ignorance and inexperience which are too often displayed there, invite insult. It is a matter of common experience that "justice of the peace law" is a favorite subject of ridicule, not only at the bar but among laymen. Hence there is great danger that those courts will be treated openly with that contempt which is too often secretly felt for them. They require, therefore, to be armed with the power to enforce at least outward respect. The danger of an extreme and unwarranted exercise of this power is largely imaginary; and even if it were entirely real, the remedy by indictment or by civil action for a flagrant abuse of it, furnishes sufficient protection to individual liberty. It is therefore held, in a number of cases, in accordance with these principles that the power to punish contempts is inherent, from necessity, in courts not of record as well as in those of higher grade: 2 Bish. Crim. Law, sec. 244: *Hollingsworth v. Duane*, Wall. C. C. 77; *State v. Copp*, 15 N. H. 212; *Watson v. Williams*, 36 Miss. 331; *Shattuck v. State*, 51 Id. 50; *Cooper's case*, 32 Vt. 253. In delivering the opinion in the case last cited: Aldis, J., says:

"The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business. It represses disorder, violence, and excitement, and preserves the gravity, tranquillity, decorum and courtesy, that are necessary to the impartial investigation of controversies. It secures respect for the law, by requiring respect and obedience to those who represent its authority. Its exercise is not merely personal to the court and its dignity, it is due to the authority of law and the administration of justice. In England this power is not confined to the superior courts. It is exercised by the courts of quarter sessions, a tribunal composed of two justices of the peace, and charged with the trial of inferior offenses: *Rex v. Clement*, 4 Barn. & Ald. 229. So the court, leet a tribunal of still more inferior jurisdiction, had the same power: 8 Co. 38 b. The power is generally regarded, both in England and in this country, as incident to all courts of record: 11 Co. 44 a; 7 Co. 32; 4 Bl. Com. 246. In Vermont, justices' courts are courts of record."

And further on, in the same opinion, he thus comments upon the necessity of the existence of this power in magistrates' courts: "The power to punish for contempts is indispensable to the proper discharge of their duties by magistrates. Without it the magistrate would be in a pitiable condition, compelled to hold court, to investigate controversies, examine witnesses and listen to arguments, and yet powerless to secure order in his proceedings, to enforce obedience to his decisions, to repress turbulence, or even to protect himself from insult. The mere power to remove disorderly persons from this court room would be wholly inadequate to secure, either the proper transaction and dispatch of business, or the respect and obedience due to the court, and necessary for the administration of justice."

It is worthy of remark that in the case just mentioned the contempt was

no more aggravated than is often permitted to go without reprehension in justice courts. It seems that Mr. Cooper, a lawyer of considerable eminence in Vermont, was engaged in the trial of a case before a justice, and took frequent occasion to refer to what the supreme court would hold. The justice finally remarked that it would no doubt suit Mr. Cooper to have the supreme court sitting all the time. Mr. Cooper replied: "I don't think that is necessary, for I think this magistrate wiser than the supreme court." For this remark the justice fined him ten dollars, and imprisoned him until he should pay it. The case was twice heard in the supreme court—once on appeal, and once on an application by the prisoner for his discharge upon a writ of habeas corpus. At the second hearing, *Cooper's case*, 32 Vt. 258, Mr. Chief Justice Redfield delivered the opinion. His observations upon the duties of attorneys in magistrates' courts are worthy of the especial attention of members of the bar for the just and admirable sentiments which they express: "Perhaps it is just to all concerned to say that the relator, upon his own showing, must have used the words adjudged a contempt in an ironical sense, and intended thus to convert them by a sarcasm into a weapon of offense. This is entirely allowable towards those standing in relations of equality, where no obedience or submission is due. But in those relations where the law for any cause requires submission and obedience, the case is different. In the relations of parent and child, or teacher and pupil, or the court and its bar, the decisions of the superior, for the time being, are final, and are to be respected, whether wise or foolish in fact. And they cannot be encountered with sneers and sarcasm, however just and appropriate the weapon may seem to those who use it, or to others. The counsel must submit in a justice's court as well as in this court, and with the same formal respect, however difficult it may be either there or here.

Mr. Bishop remarks, 2 Bish. Crim. Law. sec. 263, that the opinion "may perhaps be well founded" that a justice's power to punish contempts is limited, as mentioned in some of the decisions already referred to, to cases where the offense is committed in the magistrate's presence while holding court. The learned author, however, does not seem entirely satisfied with the correctness of that limitation. Nor is it easy to discover any solid reason for such a limitation. Why, for instance, should not a witness be punished for contempt for disobeying a magistrate's subpoena, as in *Robb v. McDonald*, 29 Iowa, 330? Or why should not an attachment issue for a juror who, after retiring from the magistrate's presence to consider the case with his fellows, separates from the rest of the jury and departs without leave, as in *Murphy v. Wilson*, 46 Ind. 537? Are not acts such as these as obstructive of the business of a justice's court as any conduct of which a person could be guilty in the presence of the magistrate?

A JUDGE OUT OF COURT has power in some of the states to punish certain contempts. Thus in Iowa it has been held that a judge in vacation may punish disobedience of a writ issued in term: *State v. Myers*, 44 Iowa, 580. But it was held in *Taylor v. Moffatt*, 2 Blackf. 305, that an order made by a judge in vacation punishing disobedience of an injunction issued in vacation was a nullity. And in *People v. Brennan*, 45 Barb. 344, it was decided that without express statutory authority a judge out of court could not punish disobedience of an order made in a statutory proceeding. But it has been held that a court has inherent power to punish disobedience of an order made by one of the judges out of court: *Wicker v. Dresser*, 13 How. Pr. 331.

THE COURT IN WHICH A CONTEMPT IS COMMITTED MUST PUNISH IT, for in a matter so nearly concerning the dignity, and indeed the very existence,

of the court, any other tribunal cannot interfere. If a proceeding for contempt were triable in another court, the necessity for the remedy would cease. In the answer of Fortescue and Prisot, JJ., to the question whether the speaker of the house of commons could be lawfully committed in the exchequer for a trespass, 13 Co. 64, it is said: "In *Sir John Paston's case* it is holden, that every court shall determine and decide the privileges and customs of the same court." Contempts are therefore necessarily triable solely in the courts where committed:" *Ex parte Rowe*, 7 Cal. 175; *People v. County Judge*, 27 Id. 151; *Darby's case*, 3 Wheeler Crim. Cas. 1; *First Congregational Church v. Muscatine*, 2 Iowa, 69; *Passmore Williamson's case*, 27 Pa. St. 18; *Ex parte Stickney*, 40 Ala. 160; *Sanders v. Metcalf*, 1 Tenn. Ch. 419; *Cabot v. Yarrowborough*, 27 Ga. 476; *Howard v. Durand*, 36 Id. 346; *State v. Thurmond*, 37 Tex. 340; *Phillips v. Welch*, 12 Nev. 158. The supreme court can not punish a contempt committed in an inferior court: *Penn v. Messenger*, 1 Yeates, 2; and the supreme court of the United States cannot punish a contempt in one of the district courts: *Tillinghast's case*, 4 Pet. 108. Nor can a supreme court compel an inferior tribunal, by mandamus, to punish a contempt unless, perhaps, where the civil rights of an individual are concerned: *Chamberlain's case*, 4 Cow. 49. Nor on the other hand can the proper court be restrained by any other from punishing a contempt against its dignity and authority: *Sanders v. Metcalf*, 1 Tenn. Ch. 419.

A JUDGMENT FOR CONTEMPT IS NOT REVIEWABLE or revisable in any other court. This is a general principle supported by a great array of authority, and rests upon the same grounds as the rule forbidding the trial of a contempt, in the first instance, in any other court than the one in which it was committed. During the reign of James I., while that sturdy champion of the common law, Sir Edward Coke, and his brethren of the court of king's bench, were engaged in a struggle against the efforts of the court of chancery to administer equitable relief after an adverse judgment at law, there were several instances in which the law court released on habeas corpus prisoners who had been committed for contempts in chancery. These cases are reviewed in the learned opinion of Mr. Senator Platt in *Yates v. Lansing*, 6 Am. Dec. 290. The struggle was, however, soon abandoned, and it became the established doctrine of the English courts, that if the tribunal pronouncing a judgment of contempt had jurisdiction for that purpose, the judgment could not be reviewed in any other court, upon appeal, writ of error, habeas corpus or any other proceeding.

An interesting case arose in the troublous times of Charles I. One Chambers was committed to the Fleet by a decree of the court of star chamber, of infamous memory, for saying at the council table "that the merchants of England were screwed up here in England more than in Turkey." The sentence was that he should pay a fine of two thousand pounds and be imprisoned until he should make his submission at the council table. He sued out a writ of habeas corpus, which was returned before the king's bench, and prayed to be delivered because the sentence was unlawful. "But all the court informed him that the court of star chamber was not erected by the 3 Hen. VII., c. 1, but was a court many years before, and one of the most high and honorable courts of justice; and to deliver one who was committed by the decree of one of the courts of justice was not the usage of this court, and therefore he was remanded:" *Chambers' case*, Cro. Car. 168.

A leading decision on this point is *Brass Crosby's case*, 2 W. Bl. 754. Brass Crosby, a member of the house of commons, was committed for a contempt of the privileges of the house, and applied for a release upon habeas corpus, but

the application was denied and in their opinion the judges said: "The house of commons is a supreme court of judicature with respect to its own privileges, and especially over its own members. This court never discharges persons committed for a contempt by any supreme court, such as the two houses of parliament and the courts of Westminster Hall. The law has entrusted to these the power of judging of their own contempts in the last resort. If there lay any appeal from them, it would detract from their dignity, and they would cease to be supreme courts: *Paston's case*, 12 Edw. 4; *Trewyniard's case*, Dyer, 59 b.; *Chamber's case*, Cro. Car. 168; Id. 579; Ld. Raym. 1108. Writs of attachment and commitments for contempts express no particulars of the contempts, because if expressed they could not be examined. And the legislature has affirmed and approved of the process of contempts as established by the common law: Stat. 13, Car. II, c. 2, sec. 4; 9 and 10 W. III, c. 15. The cases cited are all of inferior courts except one or two hasty ones in the time of Jac. I, when the courts of king's bench and chancery were peevishly struggling for jurisdiction."

In the United States the great weight of authority is in favor of the proposition that where one has been fined or committed for a contempt by a court of competent jurisdiction he can have no appeal, or writ of error, habeas corpus, or other relief, unless by virtue of some statute: *State v. Tipton*, 1 Blackf. 166; *Lockwood v. State*, 1 Ind. 161; *Hunter v. State*, 6 Id. 423; *Kernodle v. Cason*, 25 Id. 362; *Ex parte Smith*, 28 Id. 47; *State v. Woodfin*, 5 Ired. 199; *Ex parte Adams*, 25 Miss. 883; *Watson v. Williams*, 36 Id. 331; *Shattuck v. State*, 51 Id. 50; *Watson v. Thomas*, 6 Litt. 248; *Patton v. Harris*, 15 B. Mon. 607; *Matter of Cohen*, 5 Cal. 494; *Coryell v. Holcomb*, 9 N. J. Eq. 650; *People v. Simonson*, 9 Mich. 492; *Romeyn v. Caples*, 17 Id. 449; *Tillinghast's case*, 4 Pet. 108; *Lining v. Bentham*, 2 Bay, 1; *State v. Johnson*, Id. 385; *Floyd v. State*, 7 Tex. 215; *Jordan v. State*, 14 Id. 436; *Crow v. State*, 24 Id. 12; *Darby's case*, 3 Wheeler's Crim. Cas. 1; *State v. Giles*, 10 Wis. 101; *Vilas v. Burton*, 27 Vt. 56; *Cooper's case*, 32 Id. 253, 258; *Robb v. McDonald*, 29 Iowa, 330; *State v. Towle*, 42 N. H. 540; *Cossart v. State*, 14 Ark. 538; *Bunch v. State*, Id. 544; *Easton v. State*, 39 Ala. 551; *Martin's case*, 5 Yerg. 456; *State v. Galloway*, 5 Cold. 326; *Yates v. Lansing*, 6 Am. Dec. 290; *Mitchell's case*, 12 Abb. Pr. 249; *People v. Sturtevant*, 9 N. Y. 263; *People v. Kelly*, 24 N. Y. 74; *People v. Fancher*, 4 Thomp. & C. (N. Y.) 467; *Kearney's case*, 13 Abb. Pr. 459; *State v. White*, T. U. P. Charlt. 138. And it has been held that an appeal does not lie even where the right of jury trial is given: *Casey v. State*, 25 Tex. 38. In *Hunter v. State*, 6 Ind. 423, the court said that the only remedies available to a party committed for a contempt were: 1. Habeas Corpus; 2. Impeachment; or, perhaps, 3. Civil suit. The only question, however, which can be tried on habeas corpus is that of jurisdiction: *State v. Towle*, 42 N. H. 540; *Ex parte Perkins*, 18 Cal. 60; *State v. Galloway*, 5 Cold. 326; *Perry's case*, 30 Wis. 268; *Kearney's case*, 13 Abb. Pr. 459. If the order is made upon the showing of an adverse party without notice to the accused, it will be irregular and he will be discharged: *Langdon's case*, 25 Vt. 680. So, if the record does not disclose any judgment or conviction for contempt, or any definite term of imprisonment, the prisoner will be discharged: *Ex parte Adams*, 25 Miss. 883; *Hammel's case*, 9 R. I. 248. It was decided in *Summers, ex parte*, 5 Ira. 149, that if the commitment disclosed a contempt in general terms, which it might properly do, it would be binding on a review on habeas corpus, but if it set out the facts constituting the contempt and they did not amount to a contempt, the prisoner should be released. So in *Easton v. State*, 39 Ala. 551, it was held that

the facts need not be set out, but it was held otherwise in *State v. Gallwey*, 5 Cold. 326; and *Batchelder v. Moore*, 42 Cal. 412. And in Iowa also, it seems to be required that the facts constituting the contempt should be set forth: *Skiff v. State*, 2 Iowa, 550; *State v. Utley*, 13 Id. 593. That an action will not lie against a judge for committing one for a contempt where he has jurisdiction: See *Yates v. Lansing*, 6 Am. Dec. 290, and note.

AN APPEAL HAS BEEN HELD TO LIE from a judgment of contempt in several cases. It was so determined in *Stuart v. People*, 3 Scam. 395, on the ground that, a under the ruling in the principal case, a proceeding for contempt is a criminal proceeding, a general statute giving a right of appeal in criminal cases applies to a judgment of contempt. See also, *Thatcher ex parte* 2 Gilm. 170. An appeal has been held to lie also from a commitment for contempt for disobedience to an injunction: *Buel v. Street*, 9 Johns. 441; *McCredie v. Senior*, 4 Paige, 378; *Shannon v. State*, 18 Wis. 604; and in Tennessee commitments for disobedience to orders and process in chancery generally are appealable: *Hundhausen v. U. S. Mar. & F. Ins. Co.*, 5 Heisk. 702. Appeal from a judgment of contempt lies also in South Carolina under the present practice: *Stokes' case*, 5 S. C. 71. In Georgia, appeals from such judgments are allowed with great reluctance: *Dobbs v. State*, 55 Ga. 272.

CERTIORARI LIES FROM A JUDGMENT OF CONTEMPT in Iowa and North Carolina: *Dunham v. State*, 6 Iowa, 245; *Biggs' case*, 64 N. C. 202. So in *ex parte Fields*, 1 Cal. 152, 187, it was held that if the judgment did not set out the facts constituting the contempt it would be reversed on certiorari. In Kentucky, a judgment for contempt seems to be reviewable in a limited degree. But the appellate court will not re-try the question of contempt or no contempt: *Bickley v. Commonwealth*, 2 J. J. Marsh, 572; *Turner v. Commonwealth*, 2 Met., (Ky.) 619. In an early Virginia case it was decided that a writ of error would lie from the superior court to the county court in a case of contempt, because the latter was an "inferior court:" *Stokeley v. Commonwealth*, 1 Va. Cas. 330.

AN ATTORNEY DISBARRED FOR CONTEMPT has a right of appeal, for this is not, properly speaking, a punishment for contempt. The punishment for that offense, sanctioned by immemorial usage, is fine and imprisonment: *State v. Start*, 7 Iowa, 499; *Ex parte Smith*, 28 Ind. 47. Striking an attorney's name from the roll is a proceeding of a different nature. Although a contempt committed may be the immediate moving cause, still the judgment of removal does not go upon that ground, but upon the ground that the attorney has forfeited his rights as an officer of the court by his flagitious or improper conduct. It is therefore in his case not a mere judgment of contempt, but of removal from office, and it is proper that from that judgment an appeal should lie: *People v. Turner*, 1 Cal. 143; *State v. Start*, 7 Iowa, 499; *Turner v. Commonwealth*, 2 Met. (Ky.) 619; *Rice v. Commonwealth*, 18 B. Mon. 472; *Dillon v. State*, 6 Tex. 55; *Jackson v. State*, 21 Id. 668; *Ex parte Smith*, 28 Ind. 47.

THAT A PROCEEDING FOR CONTEMPT IS A CRIMINAL proceeding, as affirmed in the principal case, is a doctrine which was approved in *Stuart v. People*, 3 Scam. 395; *Hill v. Crandall*, 52 Ill. 70. But the contrary is held in *Middlebrook v. State*, 43 Conn. 257. Indeed, it has been decided that a conviction for contempt and the imposition of a fine constitute so far a criminal judgment that the court cannot afterwards remit the penalty on the ground of the offender's inability to pay, and that the executive may pardon the offense: *Muller's case*, 7 Blatchf. 23; *State v. Sawiniet*, 24 La. An. 119.

SNYDER v. LAFRAMBOISE.

[BRESEE, 343.]

A PARTY ACCEPTING A QUITCLAIM DEED of land runs the risk of the goodness of the title, and if it fails, he cannot recover the purchase-money, unless he can show fraud in the sale.

A TOTAL FAILURE OF TITLE on a sale of land, unaccompanied by circumstances warranting the belief that the vendor acted dishonestly, is not *prima facie* evidence of fraud.

THE ADMISSION OF IMPROPER EVIDENCE, UNEXCEPTED TO at the trial, is not, as a general rule, a ground for relief in an appellate court.

WHERE THERE IS A COMMUNITY OF INTEREST AND DESIGN, the declarations of one of the parties are admissible in evidence against the rest.

INSTRUCTIONS TO A JURY SHOULD BE POSITIVE and specific, and should leave nothing to inference.

APPEAL. The case appears from the opinion.

Breese and Semple, for the appellant.

Blackwell, for the appellee.

By Court, LOCKWOOD, J. This was an action of assumpsit commenced in the St. Clair circuit court by Laframboise against Snyder. The declaration contains the common money counts to which the defendant below pleaded non-assumpsit. On the trial of the cause, the defendant took a bill of exceptions containing the evidence and the charge of the judge. From the bill of exceptions it appears that the plaintiff below purchased a tract of land of the defendant and one Louis Pinconneau, for which he paid one hundred and fifty dollars, and received from them a quitclaim deed, in which it is stipulated that they do not warrant the land against the claims of any persons but themselves. It was also proved that the defendant below had no title to the premises. The plaintiff further proved by a witness that after the sale and purchase, said Pinconneau told witness that he, said Pinconneau, had understood plaintiff did not wish to trade with Snyder for the land, as he was afraid he, Snyder, would cheat him, being a lawyer; that plaintiff preferred trading with said Pinconneau; that plaintiff would find that he, Pinconneau, could cheat as well as defendant; and that Pinconneau admitted to witnesses that the legal title to the said land was in the heirs of one Augustin Pinconneau; that if plaintiff would give fifty dollars more, he, Pinconneau, would make plaintiff a warranty deed, as he would let Augustin Pinconneau's heirs have other lands for it." The defendant was not present when these statements were made by Pinconneau. Some testimony was

adduced on the part of the defendant, which it is unnecessary to notice. After the testimony was produced, the defendant moved the court to instruct the jury, that if there was no fraud practiced by defendant, nor any false affirmation as to his title, the plaintiff could not recover; and further, where there is no false affirmation or fraud in a sale of lands, the purchaser cannot recover back the purchase-money, and that in the sale of land where there is no fraud, the maxim of *caveat emptor* applies. The court, however, instructed the jury that if they were satisfied from the evidence that Snyder and Pinconneau sold a title to the land, either legal or equitable, when in truth they had no title of either kind, or that they, or either of them, deceived the plaintiff as to the title, they should find for the plaintiff; but if they were satisfied from the evidence that Snyder and Pinconneau did not deceive the plaintiff as to the nature of the title, they ought to find a verdict for the defendant. To all of which instructions the defendant, by his counsel, excepted. A verdict was found for plaintiff, and judgment rendered thereon. Several errors have been assigned, and under them it was urged that a part of the testimony ought not to have been permitted to go to the jury, and that the instructions were not such as the defendant was entitled to and prayed for. *The court, in examining the bill of exceptions, do not find that the testimony was excepted to on the trial.

If a party permits improper testimony to go to the jury without objection, the reasonable presumption is that it was received by consent. In the event that a verdict should be found on such testimony, the proper remedy is by a motion for a new trial, and the case must be a strong one where this court will interfere to protect a party who stands by and permits improper testimony to be given to the jury. The court feel themselves called on to condemn the practice that seems to prevail extensively, to suffer illegal testimony to be given to the jury, and then rely upon the skill of counsel to extricate his client from the effect of such testimony. This course leads to much embarrassment, and frequently presents much difficulty in distinguishing between the province of the court and jury. In this case, the court feel no hesitation in declaring that the evidence of the declarations of Pinconneau, under the circumstances, were not evidence against the defendant, and no doubt exists that had the court below been called on to take this evidence from the jury that it would have been withdrawn, and in that event no verdict could have been given for the plaintiff. The rule of

law on this point is that where there is a community of interest and design, the declarations of one of the parties is evidence against the rest, and this rule is not confined to cases of civil contract.

It is indeed true that, in general, the declarations or admissions of one trespasser or other wrong-doer is not evidence to affect any other person, for it is merely *res inter alios*, but where it has once been established that several persons have entered into the same criminal design, with a view to its accomplishment, the acts and declarations of any one of them in furtherance of the general object, are no longer to be considered as *res inter alios* with respect to the rest. They are identified with each other in the prosecution of the scheme. They are partners for a bad purpose, and as much mutually responsible as to such purpose as partners in trade are for more honest pursuits, and may be considered as mutual agents for each other. Where a unity of design and purpose has once been established in evidence, it may fairly and reasonably be presumed that the declarations and admissions of any one, with a view to the prosecution and accomplishment of that purpose, convey the intentions and meaning of all; and this seems to be the general rule in the case of trials for conspiracies, and other crimes of a like nature: 2 Starkie on Ev. 47. It was urged on the argument that Snyder and Pinconneau ought to be considered as partners, and consequently the admissions of either be evidence against the other. The court are, however, of opinion that this action cannot be sustained on this principle. The plaintiff's right to recover in this case depends upon the question whether the defendant and Pinconneau were guilty of fraud in selling the land mentioned in the deed. Even in equity, a vendee has no remedy on the ground of failure of title, if he has no covenants, and there is no fraud: *Chesterman v. Gardner*, 5 Johns. Ch. 29 [9 Am. Dec. 265;] *Gouveneur v. Elmendorf*, Id. 79. And the fraud must exist at the time of the execution of the deed or lease, and not fraud in a subsequent transaction.

Testing this case by the above principles, there is an absence of evidence of any concerted design between Snyder and Pinconneau to defraud the plaintiff below. The declaration of Pinconneau being made subsequently to the execution of the deed, and in the absence of Snyder, and there being no evidence of concerted design, must be considered as admissions *res inter alios*, and consequently, hearsay, and inadmissible as evidence.

But ought the court to reverse the judgments because of the

inadmissibility of this evidence. Were there no other objections to the judgment, the court might well doubt whether they ought to interfere, but on examining the charge of the judge, they are of opinion that it is not as specific and certain as it ought to have been. The rule in relation to the charge to the jury is, that it be positive and specific, and that nothing be left to inference. From what the judge said in the first part of the charge, the jury may have inferred that if they believed that Snyder and Pinconneau had no title to the land sold, that the plaintiff had a right to recover, yet from the latter part of the charge the jury might have an equal right to infer that the plaintiff had no right to recover, unless Snyder and Pinconneau had deceived the plaintiff as to the nature of their title. The charge then, as preserved in the bill of exceptions, does not convey to the jury distinctly the precise rule that is to govern them in their deliberations. The court are of opinion that the judge should have instructed the jury that the defendant was not liable to refund the money paid in this case, unless the defendant, previous to the sale, affirmed what he knew to be false in relation to the title to the land, or concealed some material fact in relation to the title, or used some fraudulent means to induce the plaintiff to accept a deed without covenants of warranties; that a party who takes a quitclaim deed on the sale of land, runs the risk of the goodness of the title, unless some fraud has been practiced upon him. Inasmuch then as the charge may have had an improper influence on the jury, the judgment must be reversed with costs, and the cause remanded to the St. Clair circuit court, for further proceedings.

See the cases of *Livingstone v. Maryland Insurance Company*, 7 Cranch, 506; 11 Wheaton, 59, as to the manner of charging a jury.

SMITH, J. I concur in the reversal of the judgment in this cause, on the ground that it is possible the jury may have decided against the defendant on the simple ground of a failure of title in Snyder and Pinconneau, without considering it essential that there should have been evidence of fraud against him.

I hold the doctrine correct that where there is a total failure of title in a case like the present, and no circumstances are adduced to induce the jury to believe that the vendor has acted dishonestly in the sale, but are left to infer that he may have sold under a mistaken impression of his title, that such sale is

not *prima facie* evidence of fraud, and that it is necessary to entitle a party to recover to show facts sufficient to warrant inferences of fraud. From the general character of the charge, and the fact of the qualification in it (being in the disjunctive), it may have led the jury to the simple inquiry whether Snyder had little or not; and as none was shown on the trial, they may not have inquired into the question of fraud. That an individual may execute a release for a valuable consideration, for a supposed interest in lands, when in truth he may have no title, either legal and equitable, and not liable to refund, will depend upon the honesty with which he acts. Should he conceal facts, or misrepresent others necessary to a correct understanding of his title, it cannot be doubted that he would be liable.

In the present case it does not appear that Snyder was guilty of either a suppression or a misrepresentation of the manner in which he deduced his title to the lands in question. I had great doubts on the motion for a new trial, whether it ought not to have been granted; but as the evidence of Pinconneau's declarations were not objected to on the trial, and the whole evidence had been weighed by the jury, whose peculiar province it alone was to determine its character and force, I did not feel disposed to disturb the verdict. Upon reflection, I am now satisfied that the confessions of Pinconneau were not evidence; that they must have had great weight with the jury in determining their verdict, that there was no evidence connecting Snyder's acts with these confessions, and when Snyder was not present, and that a possible indistinctness in the charge given may have had its effect upon the jury to lead them away from the question of fraud in selling the lands in controversy. I believe, for the purposes of justice, that the reversal of the judgment will be but right, all circumstances considered, and therefore concur in the reversal.

Judgment reversed.

Unless there be fraud or warranty a purchaser of real estate cannot recover the purchase-money on a failure of title: *Dorsey v. Jackman*, 7 Am. Dec. 611. This is the well-established doctrine both at law and in equity: *Doyle v. Knapp*, 3 Scam. 334; *Owings v. Thompson*, Id. 505.

The rule of *caveat emptor*, applicable to sales of real estate leaves the purchasers to protect themselves by covenants of warranty except where there is fraud: *Slack v. McLagan*, 15 Ill. 242. And it is well settled that one who takes a mere quitclaim deed must, in the absence of fraud, run the risk of the title both at equity and at law: *Stokey v. Hughes*, 18 Ill. 55; *Sheldon v. Harding*, 44 Id. 68; *Botsford v. Wilson*, 75 Id. 132. The case of *Sheldon v. Harding*, 44 Id. 68, was a suit in equity to enforce a trust and recover money

paid for a quitclaim deed where the title had failed. The court said: "There can be no doubt that a quitclaim deed for land, without reference to the character of the title, is, in the absence of fraud, a sufficient consideration to support a contract; money paid for such a conveyance cannot be recovered back, or a plea of failure of consideration maintained to a note given for such a conveyance. Such deeds are made because the vendor is unwilling to warrant the title, and they are accepted because the grantee is willing to take the hazard of the title, and believes it is worth the price he pays or agrees to pay. And unless fraud is practiced upon the grantee the law permits such contracts to be made, and will uphold and enforce them. But where the vendor agrees to give a specific title he must do so whether there is fraud or not: *Tyler v. Young*, 2 Scam. 444; *Gorham v. Peyton*, Id. 363; *Owings v. Thompson*, 3 Id. 505."

. HERBERT v. HERBERT.

[BENNETT, 354.]

PRIOR POSSESSION IS SUFFICIENT EVIDENCE of a fee unless rebutted, although it is the lowest evidence; and where there is no other evidence of title, prior possession short of twenty years will prevail over a subsequent possession for the same time, and will suffice without other proof to put the tenant on his defense.

CONVEYANCE BY ADMINISTRATOR OUT OF POSSESSION.—Where an administrator sells and conveys land pursuant to a special act of the legislature, the deed is valid, notwithstanding the fact that the land is in the possession of another who took possession with the administrator's consent.

COMPETENCY OF GRANTOR AS WITNESS.—A grantor, who has made no covenants, and has no interest in a suit relating to the land, is a competent witness.

A DEED NOT DELIVERED AND ACCEPTED, though recorded, is invalid and passes no estate.

AGREED CASE. The plaintiffs brought an action of ejectment for certain premises against John C. Herbert and Charles Louviere, his tenant. The plaintiffs proved a conveyance to them from Charles Slade, the administrator of Thomas F. Herbert, dated July 23, 1823, upon a sale made under a special act of the legislature, entitled "An act authorizing the administrator of Thomas F. Herbert, deceased, to sell certain lands," and also proved that the said Thomas F. Herbert and his grantors were in peaceable possession of the premises from 1810 to the death of the said Herbert; and that Louviere, the tenant, was in possession at the time of the declaration and notice. A motion made by the defendants for a nonsuit was overruled. The defendants then produced their evidence of title, claiming under a deed from Thomas F. Herbert to John C. Herbert, dated September 29, 1818. The plaintiffs objected that said deed was

not properly attested by witnesses, and had never been delivered. The evidence in relation to said deed, and other facts upon which the defendants relied are stated in the opinion. To prove the non-delivery of the deed, the plaintiffs offered Charles Slade as a witness, who was objected to on the score of interest. Slade swore that he had no interest in the suit, and his deed to the plaintiffs contained no covenants. The defendants proved that shortly after T. F. Herbert's death, John C. Herbert went into possession, by his agent, with the consent of the administrator, and had continued in possession ever since.

Judgment for the plaintiffs, subject to the opinion of the supreme court upon the facts.

Breese, for the plaintiffs.

Kane and Baker, for the defendants.

By Court, SMITH, J. Under the agreed case, upon which this cause has been presented to this court, four questions are to be considered: 1. Was the motion in the court below for a nonsuit, properly overruled? 2. Was the execution of the deed of Slade, as administrator of Herbert, valid; and did the title to the lands in question pass thereby? 3. Was the grantor, Slade, a competent witness on trial? 4. Was there a due execution and delivery of the deed by Thomas F. Herbert to John C. Herbert?

The action of ejectment is considered in reality as an action of trespass, adding thereto an execution by which the prevailing party obtains the possession of the thing itself. The plaintiff must prove property in himself, or a right of possession—he may try the title or not, and if he does not desire to adduce his title, he may try nothing but the right of possession. Prior possession is evidence of a fee, and, although the lowest, unless rebutted by higher, it must clearly prevail. It is equally well settled, that the lessor of the plaintiff must recover on the strength of his own title. Let these principles be applied to the case before us, and inquire upon what evidence the court below overruled the motion for a nonsuit. It appears from the case, that it was proven that N. Edwards, through whom the title in question is asserted, had peaceable possession of the premises as early as 1810, and continued it, without any chasm, until the sale to Thomas F. Herbert, on the seventh of September, 1818; that Herbert, immediately upon the purchase, went into peaceable possession, and died in possession in 1821. A deed regularly executed by Charles Slade, the administrator of Thomas

F. Herbert, of the date of the twenty-third of May, 1823, conveying to the lessors of the plaintiff the land in question, which had been duly recorded, was produced, and to whom he had sold the same under the authority of, and in compliance with a law of this state, approved the nineteenth of December, 1822. The plaintiff also proved that Charles Louviere, the tenant, was in possession at the time of the service of the declaration, and here rested his case.

The supreme court of the state of New York have said, that title may be inferred from ten years' possession, sufficient to put the defendant on his defense: *Smith ex. dem. Teller v. Burdis*, 6 Johns. 197 [5 Am. Dec. 218]; and that a prior possession, short of twenty years, under a claim of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side. There are several decisions of that court which sustain this doctrine: *Smith v. Lorillard*, 10 Johns. 355; *Jackson v. Myers*. 3 Id. 388 [3 Am. Dec. 504]; *Jackson v. Harder*, 4 Id. 202 [4 Am. Dec. 262].

The proof here adduced was *prima facie* evidence, both of title and of right of possession, and was sufficient to put the defendant on his defense. It was not necessary that the plaintiff should have shown a possession of twenty years, or a paper title. Upon this state of the case, the mere naked possession of the defendant could not prevail against it. There can, then, be no doubt that the motion for a nonsuit was properly overruled. The next point to be considered is the validity of the deed of the administrator.

T. F. Herbert having died in 1821, between that time and the making of the deed by his administrator in 1823, by consent of the administrator, John C. Herbert, by his agent, took possession of the premises in question, and continued up to the present time. It is then contended, that the administrator being out of possession of the lands at the time of making the conveyance, it is therefore void. Upon the death of Herbert, the estate in the premises passed to his heirs, and the legislature having by a law authorized the sale of the premises by the administrator, we think it not important to inquire whether the administrator was in or out of the actual possession of the land, at the time of making the conveyance by him. It may be doubted whether the possession of Herbert was such an adverse possession as would have rendered a conveyance by the heirs void; but the law of the legislature must be considered as a paramount authority; and it being admitted that the convey-

ance has been made agreeably to the provisions of that law, the estate of which Herbert died seised passed by that deed, and it was well executed, and not void because of the possession of the agent of John C. Herbert. Where the title is divested by the operation of the law, as in sales under execution, the possession cannot be considered such an adverse possession as to defeat the deed and render it inoperative: *Jackson v. Bush*, 10 Johns. 223. The inquiry as to the competency of Slade, the administrator and grantor of the deed to the lessor of the plaintiff, will now be considered.

It is apparent that Slade had no interest in the decision of the cause; he had entered into no covenants upon which he could be liable; upon general principles, then, he was a competent witness, and the rule that all persons not affected by crime or interest are competent witnesses, must prevail. This is not a question of the admissibility of the maker of an instrument to impeach it, or destroy it for want of a consideration, or for fraud. Though even in such a case, the grantors in a deed have been admitted in an action of ejectment in the supreme court of Massachusetts, that court deciding that the exception made applies alone to negotiable instruments, which upon principles of public policy and morality ought not to be suffered to be impeached: *Loper v. Haynes*, 11 Mass. 498.

In the present instance Slade was not offered to prove any fact in connection with the execution of his deed as administrator, but collateral facts affecting the deed from Thomas F. Herbert to John C. Herbert. His admissibility, then, depended entirely upon his interest in the event of the suit, and standing indifferent in that respect he was properly admitted to testify.

The last and remaining question, and most important one in the case, is, whether there was a delivery of the deed from T. F. Herbert to John C. Herbert. The objection to it is, that it was never delivered by the grantor to the grantee, nor to any other person for his use, nor was there any acceptance by the grantee. The facts disclosed in relation to this deed are, that it was found among the papers of Thomas F. Herbert after his death, by Slade, his administrator; that the deed had never been in possession of the grantee, the administrator did not know where it was. The original deed was not produced in evidence, nor its absence accounted for; but the records of the county, which showed that the deed had no subscribing witness, was acknowledged before the justice of the peace, bore date on the twenty-ninth of September, 1818, and was recorded

on the fifteenth of January, 1819. The defendant proved that Thomas F. Herbert was, in 1812, indebted unto the grantee, John C. Herbert, in the sum of twelve hundred dollars, and that he had been compelled to pay as security for Thomas F. Herbert, more than three thousand dollars since that time.

From this state of facts it is to be determined whether there was a delivery and acceptance of the deed to John C. Herbert.

It is most manifest that there could have been no delivery of the deed to the grantee, so as to pass the estate. The act of recording a deed cannot amount to a delivery when there does not appear an assent or knowledge by the grantee of the act. In this case there is not a scintilla of evidence calculated to lead the mind to the belief that the grantee ever knew of the existence of the deed until after the death of the grantor. There could, then, have been no acceptance by the grantee, because the possession of the deed, if such had been the fact, derived after the death of the grantor, could not amount to one, there having been no delivery during the life of the grantor. That it is essential to the validity of a well executed deed, that there should be a delivery, will not be controverted. This delivery is said to be "either actual, by doing something and saying nothing, or else verbal by saying something and doing nothing, or it may be both; but by one or both of these, it must be made; for otherwise, though it be never so well sealed and written, yet is the deed of no force.

"It may be delivered to the party himself to whom it is made, or to any other person by sufficient authority from him, or it may be delivered to a stranger for, and in behalf, and to the use of him for whom it is made without authority, but if it be delivered to a stranger without any such declaration, unless it be delivered as an escrow, it seems that it is not a sufficient delivery:" *Jackson v. Phipps*, 12 Johns. 419; 1 Shep. Touch. 57, 58; 2 Black. Com. 307; Viner's Abr. 27, sec. 52.

It is also held to be essential to the legal operation of the deed that the grantee assents to receive, and that there can be no delivery without an acceptance. Indeed, a delivery of a deed, which is essential to its existence and operation, necessarily imports that there should be a recipient. Now in this case, it would be idle to contend that there was a delivery and reception when the grantor died before the grantee knew of the existence of the deed; he could not, then, receive that of the existence of which he had no knowledge, nor could there have been a delivery to him without such an acceptance. There had

been no act on the part of the grantor before his death tantamount to a delivery, much less an actual one. The act of recording does not amount to it, because there appears a total absence of knowledge on the part of the grantee of such recording, or even of the existence of the deed, until after the death of the grantor, and it does not appear that he had ever received the deed. The case of *Jackson v. Phipps*, 12 Johns. 419; before referred to, and *Maynard v. Maynard*, 10 Mass. 457 [6 Am. Dec. 146], are directly in point and sustain the principles here laid down. Without, then, inquiring whether the deed was fraudulent, it is sufficient to ascertain that the deed was never well executed by delivery, and that no estate passed thereby. The judgment is therefore affirmed with costs.

Judgment affirmed.

BEAIRD v. FOREMAN.

[DISESSE, 385.]

FOR ILLEGAL OR OPPRESSIVE ACTS BY AN OFFICER, in executing process, the remedy is at law and not in equity.

DEFENDANT'S REQUEST TO LEVY UPON PARTICULAR TRACT.—A defendant in execution desiring a levy upon a particular tract should show the officer all his evidences of title, and the officer is not bound to notice loose memoranda of title.

INJUNCTION AGAINST EXECUTION—PARTIES.—If a defendant in execution makes the plaintiff and the officer both parties to a bill for an injunction, where both do not participate in the levy, the answer of the officer alone is sufficient.

EQUITABLE RELIEF AGAINST EXECUTION.—Executions regular on their face will not be adjudged void in equity, at least until an attempt is made to obtain relief in the court issuing them.

APPEAL. Certain judgment-creditors of the appellant, who was a sheriff, caused executions to be issued on their judgments and placed in the hands of the coroner, who by their direction levied the same upon the appellant's personal property. Before sale under the executions, the appellant filed a bill in the circuit court against the said creditors and the coroner, setting forth that he had certain lands subject to execution, which should be taken and sold before resorting to his personal property, in accordance with the proviso of the ninth section of the act of January 17, 1825, "concerning payments and executions," which declares "that the plaintiff in any execution may elect on what property he will have the same levied,

except the land on which the defendant resides, and his personal property, which shall be last taken in execution." An injunction was thereupon issued staying proceedings on the executions until the hearing. The coroner alone answered the bill, denying the appellant's title to the lands therein specified, and alleging that some of said lands had been sold on previous executions, and that the remainder, except his homestead, were under mortgage, and that the appellant had never exhibited to the coroner any title papers to any real estate, or surrendered to him any lands to satisfy said executions. On motion the injunction was then dissolved; after which the bill was dismissed by consent, and this appeal was taken. The grounds relied upon are stated in the opinion.

McRoberts, for the appellant.

Blackwell, for the appellees.

By Court, SMITH, J. The points presented for the consideration of this court in the present case are, that the circuit court erred in dissolving the injunction: 1. Because a part of the defendants were never served with the process, and another portion never answered; and,

2. Because the executions were not shown to the defendant in the court below, and that the same are void, and conferred no authority to the coroner to proceed under them.

To understand these objections fully, it may be necessary to recapitulate the objects of the bill. The complainant sought to enjoin perpetually, all the defendants to the bill, who were several judgment-creditors, except the coroner, in their separate and individual capacities, from proceeding to collect their several judgments by execution, because he alleges that, under the laws of this state, the property so taken in execution by the coroner was not liable to be sold, being personal property. The authority of the coroner is not disputed as such coroner, but that the appellant having real estate sufficient to satisfy the executions in his hands, it was the duty of the coroner to have levied on that, and sold it first, before he could resort to the personal estate. This ground was assumed in the argument, though it will be perceived it is not assigned as one of the causes of error, nor could it have been sustainable, when it is remembered that, if there had been any oppressive or illegal act of the coroner in the levy on the property, the circuit court possessed sufficient power to stay the proceedings under the execution and remedy the evil, if one had existed. That this power is a necessary in-

cident to all courts to prevent abuses of process, will not be denied, and that it is the proper mode to which to resort, rather than a court of equity, seems equally certain. The complainant having then a full and perfect remedy at law, the bill could not properly be sustainable for that reason.

But on examining the answers of the coroner, it is clearly shown, that all the real estate in St. Clair's county of the complainant, except the tract on which he resided, had been sold previously by the coroner upon other executions, or was subject to incumbrance by mortgage, and that the complainant neither offered the lands on which he resided, nor did he exhibit his title deeds, or manifest any desire to deliver any estate whatever, either real or personal, to be sold in satisfaction of the executions, previous to the levy made by the coroner on his personal estate. Without then deciding whether the defendant in a judgment, or the plaintiff, has the right of selecting the personal property, or the lands upon which the defendant resides, under an execution issued under such judgment, it will be apparent that the complainant has not shown that at any time before the levy upon his personal estate, or even at that time, did he offer his real estate to be sold upon the executions of the defendant.

It will surely not be contended that an officer is bound to take any loose memorandum which a defendant may offer as evidence of his title to lands, and thereupon expose the same for sale. Every reasonable evidence of title should be exhibited, and the officer satisfied that he was not proceeding to expose to sale the property of another person before the exemption could be claimed for the personal estate if that exemption be allowed by law; but which is not now decided, because the complainant has not shown himself entitled thereto, even if the statute be so construed. There is, then, no ground of equity disclosed, by which the complainant should be entitled to relief on this part of the case.

The error relied on in the first point is readily met, when it is seen that the coroner could alone answer to the allegations of the bill as to the manner of the levy, and the property taken, which is the sole ground relied on for the equitable interposition of the court. The judgment-creditors were entire strangers to the acts of the coroner, could not in any way be supposed to have participated therein, and if called on to answer as to that part of the bill, could only have avowed that the coroner had done what he distinctly states he has done.

Their answer or appearance would then have been wholly unimportant for the decision of the question before the court on the motion to dissolve the injunction, and for that reason the objection fails entirely as a ground of error. The coroner's answer to the main allegations of the bill, relied on for relief, fully meets those allegations, negating some of the most important ones, and particularly as to the time when the levy was made. The second ground, that of not showing the executions, and the mode of levying them are already anticipated by the remarks on the power of the court below on motion, to have remedied all irregularity, if any existed; and indeed, if the process of execution was void, or used oppressively for malicious purposes, the officer would no doubt be liable for whatever injury might be sustained.

If, however, the executions were void, and conferred no authority to the coroner to proceed under them, it is certain that all the parties concerned would be answerable as trespassers. But it is not by any means certain that this court would proceed to adjudge executions apparently regular upon their face, void, at least until an effort had been made in the tribunal from which they issued, for relief, in conformity to the views herein already expressed on that point. No attempt has been made to the law side of the circuit court to act aside or quash those executions as having been irregularly issued, or as being void on their face, and it will not be denied if either exist, that relief at law by making such application also exists.

The bill having been dismissed by the consent of the parties, after the dissolution of the injunction, no question is now made, whether the dissolving an injunction is a mere interlocutory order from which no appeal or writ of error lies.

Upon a full view of all the grounds presented in this case, it is the opinion of the court that there are no sufficient equitable grounds of relief disclosed by the complainant to entitle him to the interposition of a court of equity, and that the circuit court did not err in dissolving the injunction and dismissing the bill. The judgment of the circuit court is therefore affirmed, with costs.

Judgment affirmed.

HARGRAVE v. PENROD.

[BENNETT, 401.]

OFFICER'S DUTY AS TO LEVY.—An officer holding an execution should make reasonable exertions to levy it upon the property of the defendant, and he is liable for gross negligence in this respect; his want of knowledge of the defendant's property or the plaintiff's failure to point it out to him will not excuse him.

A JUDGMENT-CREDITOR'S REMEDY against a sheriff for not levying a *fi. fa.* is not lost by his discharging the debtor from a *ca. sa.* issued at his instance, though such discharge may satisfy the judgment.

CLERICAL ERRORS IN AN EXECUTION may be amended at the trial of an action against the sheriff for not levying it.

FEE-BILLS, LIKE EXECUTIONS, are *facti officio* after ninety days, under the Illinois statute.

AN OMISSION OF THE AMOUNT OF DAMAGES, in a declaration, is merely technical, and can be taken advantage of only in the court below.

APPEAL. The appellee brought an action on the case in the circuit court against the appellant for failing as sheriff to levy a certain execution. The declaration which was in two counts alleged the recovery by the plaintiff of a certain judgment against one William Lamar for one hundred and forty seven dollars and six and one fourth cents damages and costs; that he sued out a writ of *fi. fa.* on said judgment May 12, 1830, and delivered it to the defendant to be executed; that during the life of said execution the said Lamar had goods and chattels sufficient to satisfy the same, of which fact one of the counts averred that the defendant had notice; that the defendant neglected to levy, whereby the plaintiff lost his debt to his great damage. No amount of damage was specified, but the damages were laid in the summons at three hundred dollars.

The defendant pleaded the general issue and certain special pleas, as follows: 1. That the defendant did levy and sell all the goods and chattels of the said Lamar & Co.; 2. That the plaintiff should not have his action, because after the return of the said execution by the defendant and before suit, the plaintiff sued out a writ of *ca. sa.* against the said Lamar for the same judgment, upon which the said Lamar was taken into custody, and after remaining therein a long time was discharged by the plaintiff, etc. The plaintiff demurred to the two special pleas, and the demurrer was sustained.

At the trial on the general issue the plaintiff, after proving a judgment against Lamar for one hundred and forty-seven dollars and six and one fourth cents damages, and twenty-one

dollars and six and one fourth cents costs, offered in evidence an execution for one hundred and forty-seven dollars and six and a fourth cents debt, and twenty-one dollars and six and one fourth cents costs, to which the defendant objected for variance, whereupon the court permitted the plaintiff to amend the execution by striking out the word "debt" and inserting the word "damages," and then to read the execution to the jury, to which the defendant excepted. The defendant offered in evidence a certain fee-bill against Lamar, put in his hands as sheriff for collection before the plaintiff's execution, with a return thereon showing that he had levied said fee-bill on a horse belonging to Lamar, and sold the same, etc. The levy appearing to have been made ninety days after the date of the fee-bill, the plaintiff objected to the evidence, and it was excluded, to which the defendant excepted.

Verdict and judgment for the plaintiff for one hundred and fifty-five dollars and fifty-five cents, from which the defendant appealed.

Baker and Breese, for the appellant.

Grant, contra.

By Court, SMITH, J. The appellant relies on the following points for a reversal of the judgment of the court below:

1. The error as alleged in sustaining the demurrer to the second and third pleas of the defendant in the court below;
2. The variance between the execution given in evidence on the trial and the one described in the declaration, and suffering the same to be amended and given in evidence to the jury;
3. That the fee-bill offered in evidence ought not to have been rejected;
4. The omission of damages in the conclusion of the declaration of the plaintiff.

There is little difficulty in deciding on the questions arising under the demurrer. An essential ingredient is wanting in the first plea to constitute it a good one. In no part of it does the defendant aver that he used any exertion or diligence to ascertain what chattels or estate the defendant in the execution had, nor whether he made the least inquiry in relation thereto. We cannot doubt that it is the duty of an officer to whom an execution is directed and delivered, to make at least reasonable exertions to levy the same on the property and estate of the debtor, and that if he is guilty of gross negligence in this, he is liable.

The mere want of knowledge of the debtor's having estate or effects, or an averment that the plaintiff did not point out the estate or effects of the debtor to him on which to levy, is not sufficient to excuse him. The demurrer was therefore properly sustained. Equally correct was the sustaining of the demurrer to the second plea.

The liability of the sheriff for his negligence had attached before the issuing of the *capias ad satisfaciendum*, and whether the voluntary discharge of the defendant therefrom operated as a satisfaction of the creditor's judgment or not it could not take away the creditor's remedy against the sheriff, for his misconduct was in no way affected by such discharge. The plea was, then, a defective defense, and wholly immaterial.

The second point of variance is not, in our judgment, tenable. The court had the right to suffer the amendment to be made, it being a mere clerical error, and the variance was, even without such amendment, unimportant; because the description of the judgment-record set out in the declaration was only an inducement to, and not the gist of the action. Numerous authorities may be found of adjudged cases, supporting this doctrine.

On the third point, relative to fee-bills, the same rules are to govern as in cases of execution. They are declared by the statute creating them to have the force and effect of an execution, and are to be returned in the same manner. The ninety days having expired before the levy under the fee-bill, it was necessarily *functus officio*, and, consequently, the levy void. It was then properly rejected.

The objection under the last point ought to have been taken advantage of in the court below. It is merely and purely technical, and even then, it might be questioned whether the damages in the recital of the declaration, as appears in the record, has not cured the error, if it were one available in the court below. The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

DILIGENCE IN MAKING LEVY.—“An officer is bound to exercise ordinary and reasonable diligence in executing writs: *Trigg v. McDonald*, 2 Humph. 386; *Barnes v. Thompson*, 2 Swan, 313. What constitutes such diligence is a question of fact for the jury: *Finnigan v. Jarvis*, 8 U. C. Q. B. 210; and to assist them in the solution of this question the jury must consider all the facts attending each particular case. Among the most material of the facts thus to be considered are the information which the officer actually possessed, the means by which this information would have been extended, the

press of other official duties, and the various hindrances which, without his fault, may have impeded his progress. The issue most frequently to be tried in actions against officers for not levying is this: Did the defendant in execution have property of which the officer, by the exercise of reasonable diligence, could have had knowledge, and upon which a seizure could have been made? No doubt a prudent plaintiff would, on delivering the writ to the officer, take pains to inform him where property subject to the writ could be found, and would at all times co-operate with the officers in their attempts to execute the writ. The plaintiff who pursues this course places the officer in such a position that his failure to at once proceed to levy gives rise to a presumption of negligence. But the plaintiff is not bound to pursue this course. He need only place the writ in the officer's hands for service. The officer must then make reasonable search and inquiry. If such search and inquiry would have discovered property, their omission cannot be excused by showing that the plaintiff neglected to point out anything upon which a levy could be made: *Hutchings v. Rutan*, 6 U. C. C. P. 452; *Fisher v. Gordon*, 8 Mo. 386; *Tomlinson v. Rowe*, Hill & D. 410; *Bell v. Commonwealth*, 1 J. J. Marsh, 551; "Freeman on Executions, sec. 252. The doctrine of the principal case on this point is approved and followed in *Dunlap v. Berry*, 4 Scam. 327. No peril or danger of subjecting himself to an action will excuse an officer with an execution in his hands from making a levy if by reasonable effort he can discover property in his county belonging to the defendant: *Pike v. Colvin*, 67 Ill. 227.

THE OMISSION OF THE AMOUNT OF DAMAGES in a declaration will not vitiate it: *Mattingly v. Darwin*, 23 Ill. 618. It is too late after verdict to raise such an objection if the body of the declaration discloses a claim for damages exceeding the amount of the verdict: *Burst v. Wayne*, 13 Id. 509.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

BOSTON *v.* DODGE.

[1 BLACKFORD, 19.]

A PROMISE TO PAY FOR IMPROVEMENTS made by the plaintiff upon government land which the defendant purchased from the United States after the improvements were erected, is *nudum pactum*, and will not support an action on such promise, although in consequence thereof the plaintiff surrendered the possession to the defendant.

WRIT OF ERROR. Assumpsit for work and labor; plea, the general issue. The evidence produced at the trial was that the plaintiff had made improvements on land belonging to the United States, which land the defendant afterwards purchased of the government; that the plaintiff was in possession of the premises, and upon defendant's promise to pay him eighty dollars for the improvements, surrendered the same to the defendant. A demurrer to this evidence was interposed, and upon joinder, judgment was rendered for the plaintiff.

Moore, for the plaintiff.

Dewey, *contra*.

SCOTT, J.* The case as it is now before us, is suspended on the solution of this single question, was the promise of Dodge such an undertaking as would, agreeably to the rules of law, support an action of assumpsit? To answer this question correctly, it is necessary to inquire into the consideration for which

*The judges of the supreme court of Indiana during the period covered by these decisions were James Scott, Jesse L. Holman, and Isaac Blackford. The judge last named was appointed Sept. 10, 1817, in the place of John Johnson, who died in vacation preceding the December term of 1817.

the promise was made. The work and labor done and performed on the land, is set out by the plaintiff as the consideration of this promise, and he alleges that in consequence of the improvement, the land was rendered more valuable, and therefore as the defendant enjoyed the benefit, he ought to pay for the labor. Had the improvement been made at the instance and request of the defendant after he purchased the land, this position would no doubt be correct, but the fact in evidence is otherwise. The improvement was made while the land remained public property. The United States had the land for sale, and it will not be denied that they had a right to sell it, with whatever improvement was on it, and to put the purchaser in possession, without obtaining the consent of Boston, or making him any remuneration for his improvement. Dodge purchased the land of the United States, and not of Boston; he purchased it in the situation in which it was at the date of the entry; he paid for the land and all the profits and appurtenances thereunto belonging. If the improvement was a benefit to any owner, it was to the United States, who were the owners at the time the improvement was made. But it is contended that Dodge made a contract with Boston for possession of the premises, and is bound to pay agreeably to his promise. The insufficiency of this position is plain from this consideration; Dodge was entitled to possession from the moment he became a purchaser, and Boston could have no legal claim against him for giving up that which was the property of Dodge. Boston had no estate to dispose of. Had he previously to the sale obtained possession by a permit, under the law of the United States, he could have been considered as no more than a tenant at will; and of course as the sale determined that estate, he would in that case have been bound to give up the possession to the purchaser; and if Dodge had promised him anything for possession, the promise would not have supported an action. But there was no attempt made to prove that Boston ever pretended to hold possession under a permit. He had nothing but a tortious possession which he was at all times bound, both by the rules of law and common honesty, to yield up to the lawful owner; and if the owner under such circumstances promised to pay him anything it was to all intents and purposes *nudum pactum unde non oritur actio*.

By COURT. The judgment is affirmed, with costs.

CONNER v. NEW ALBANY.

[1 BLACKFORD, 88.]

FOR AN INJURY TO THE STREETS, the president and trustees of an incorporated town have not such a possession as will enable them to maintain an action of trespass, *quare clausum fregit*.

ERROR to the circuit court. The opinion states the case.

Nelson, Hurst and Moore, for the plaintiff.

Dewey and Hawk, contra.

HOLMAN, J. We learn from the record in this case that the president and trustees of New Albany commenced an action of trespass in the circuit court against Conner, in which issue was joined on the plea of not guilty, and a verdict and judgment were rendered for the plaintiffs. The only evidence of trespass was that of digging up the soil, so as to form a road across one of the streets in said town. On this evidence the circuit court instructed the jury, that the president and trustees of the town of New Albany, had a right to maintain the action by virtue of the qualified possession which, by law, they had in the streets of the town. To which opinion of the court Conner excepted; and which opinion is the only error complained of in the case. A slight attention to the nature of a public street, and examination of the powers of a town corporate, will enable us to determine this question. A street in a town is a public highway. It is a subject of common use, and not of exclusive possession; an incorporeal hereditament, in which all persons possess equal right, the right of passing over it; and is, in its nature, incapable of being reduced into possession. But it is a subject of government, and the government of it is by the act regulating the incorporation of towns, placed in the hands of the corporation. They have the power to keep it in repair, to remove nuisances, etc.; but this power is no more than a supervisor possesses over a common highway, and is certainly of a very different nature from a possession, either absolute or qualified. Consequently, no possessory right exists in the corporation by which the action can be supported: see *Connor v. The President and Trustees of New Albany*, Nov. Term, 1819. Works of use or ornament erected in the streets by the corporation, are of a different nature, and depend on different principles; and, consequently, present no argument which can affect this case. It follows, of course, that the opinion of the circuit court is incorrect.

By COURT. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, etc.

That no one can maintain trespass who did not have either the possession or right to the possession at the time of the injury is a principle recognized in *Putnam v. Wyley*, 5 Am. Dec. 346; and *Carson v. Noblet*, 6 Id. 554.

HIGHWAYS OR STREETS.—The property in a highway or street usually remains in the owner of the fee, subject to the easement of the public, and where such is the case, he can sustain trespass: 2 *Waterman on Trespass*, sec. 692. For an obstruction to a street or highway, the commissioners of the town who never had the freehold estate therein, cannot maintain a private action to recover damages, the proper remedy is by indictment for a nuisance: *Commissioners v. Taylor*, 1 Am. Dec. 647.

GALLION v. McCASLIN.

[1 BLACKFORD, 91.]

A PURCHASER HAVING NOTICE of a prior equitable title before the payment of the purchase-money or the execution of the deed cannot hold the land against such title.

NOTICE GIVEN BY THE TENANT in possession under the claimant of an equitable title, is as available against the purchaser as if given by the claimant himself.

PRIORITY IN TIME gives the advantage in right in cases of conflicting equities.

APPEAL from the circuit court. Bill in equity to obtain the legal title to a certain tract of land. The opinion states the case.

Caswell, for the appellant.

Lane, for the appellee.

BLACKFORD, J. There is much difficulty in understanding this cause from a view of the record. The answer cannot be reconciled with the depositions, and the depositions themselves are at variance with each other. The following, however, is believed to be a correct state of the case. In March, 1816, Henry McCaslin purchased a town lot, in Brookville, from Thomas Clark, for a valuable consideration; a penal bond was given by Clark, conditioned for the execution of the deed a short time afterwards; and the purchaser entered into possession. About a year after McCaslin's purchase and possession, Nathan D. Gallion bought the same lot of Clark, paid a part of the purchase-money, and took a bond conditioned for a title,

without any notice of the prior incumbrance. While a considerable part of the purchase-money remained unpaid by Gallion, and before the execution of the deed to him from Clark for the premises in dispute, Gallion was informed by one Allan Ramsay, that the lot belonged to McCaslin, who had bought and paid for it; and by William Herndon, the tenant in possession, that the lot was claimed by McCaslin, under whom he occupied. After this, Gallion and Clark prevailed upon Herndon to give up the premises; and Gallion entered into possession. The next day after the information of McCaslin's claim had been given to Gallion, he hurried away and obtained from Clark the legal title for the lot in question. McCaslin filed a bill in chancery, and had a decree in the court below, from which Gallion has appealed to this court.

The title bond upon which the complainant below founded his claim, was certainly an equitable lien on the property; and if the defendant purchased with a knowledge of that incumbrance, he must lose the cause: 3 Atk. 238. On the contrary, if he is an innocent purchaser for a fair consideration; if he paid his money and received his deed, without sufficient notice of such prior right, his title cannot be impeached either at law or in equity: 1 Eq. Cas. Abr. 333. The bill charges the sale and conveyance by Clark to Gallion on the nineteenth of March, 1817; and alleges that Gallion at that time, and before such purchase, had full knowledge of the complainant's right. The answer states, that the defendant purchased on or about the ninth of March, 1817, paid part of the purchase-money, and received from Clark a title bond; and that, at the time of the purchase, he had no knowledge of any prior incumbrance. It admits the information of Ramsay on the eighteenth of March, 1817; and says that Clark, for the first time, on the nineteenth of March following, told the defendant something about McCaslin's claim, which he declared to be forfeited. Now, what is here set out in the answer may be all true, that the defendant knew nothing about the incumbrance on or about the ninth, when he made his contract; that Ramsay told him on the eighteenth, and that Clark did not tell him till the nineteenth; and yet, at the same time, he might have received from a hundred other persons, clear and undoubted notice of the complainant's equity, before the execution of the deed. The charge, therefore, in the bill, of the defendant's knowledge of the complainant's right, at and before the sale and conveyance on the nineteenth of March, 1817, is nowhere denied in the answer; and, so far as .

Ramsay's information goes, is expressly admitted. Besides, before the execution of the deed, or the payment of a considerable part of the purchase-money, the defendant had been told by the tenant in possession, that he rented of the complainant, who claimed the property. Here was not only notice of a tenancy, but fair notice by the tenant of his lessor's claim. Herndon may be considered as the agent of McCaslin; and notice given by an agent is as effectual as if given by the principal himself. The tenant refused over and over again to give up the possession; and he could not, at last, be prevailed on by Gallion and Clark to do so, until they had obligated themselves by bond to indemnify him against his lessor for any damages he should sustain by such a breach of trust. After all this, we cannot but believe that the defendant had sufficient knowledge of the complainant's title to put him on inquiry about it, before he completed his purchase.

Let us next examine, whether this notice was given to the defendant in time to render it obligatory. But a small part of the consideration-money had as yet been paid. The consideration was five hundred dollars; of which only one hundred and fifty dollars were paid at the time of the contract. For the balance, the defendant gave Clark a title bond for a lot in Brookville, valued at two hundred dollars, and his note for one hundred and fifty dollars. Before the defendant complied with the condition of his bond by making a deed for the lot, and before he paid the note of one hundred and fifty dollars, he had received the notice of the complainant's claim to the property. Independently, however, of the circumstance, that so small a part of the purchase-money had been really paid previously to the notice, there is another fact in the case that must put it to rest. It is not denied by the answer, and is expressly proved, that the notice of this outstanding right had been given to the defendant, before the execution of the deed to him by Clark.

In the case of *Wigg v. Wigg*, 1 Atk. 384, it is determined that although a purchaser does not know of an incumbrance before he pays his money, yet if he knows it before the deed is executed it affects him with notice. This case is directly against the defendant: See, also, 18 Vin. Abr. 115. Take it for granted that the defendant had fairly obtained an equitable title without any knowledge of the defendant's equity; at that time the parties stood upon equal ground as to the nature of their claims, and the right of the complainant, being the elder,

was entitled to the preference. But it is contended that the defendant went on and procured the legal title, and thus obtained an advantage which ought not to be taken from him. It is true the purchase-money was afterwards paid, and the title perfected; and had this been done before notice of McCaslin's claim the defendant would have been perfectly safe. But the fact is otherwise. Gallion had nothing but an equitable lien before notice. Every step he afterwards took towards getting the possession and conveyance was fraudulent and void. The cases of getting in any old incumbrance to protect a subsequent claim do not apply. For example, a third mortgagee may buy in the first mortgage, and thus get an advantage over the second. Here is no injury. The second mortgagee is deprived of no benefit to which he was entitled. Neither the second nor the third mortgagee had any claim to the first mortgage. Each of them had the same privilege of buying it in, and thus obtaining any benefit under it to which it was originally entitled. But in the present case McCaslin had the prior equitable right to the legal title from Clark; and after Gallion had notice of it, his endeavor to procure that title, and thus divest McCaslin of his claim was unjustifiable. The defendant knowingly attempted to destroy the complainant's prior and therefore superior equitable right, by strengthening the younger and inferior one of his own by procuring the legal title from Clark, to which the complainant was best entitled. In such proceedings the defendant cannot be protected in a court of equity. We must put out of view everything done by him after notice. Before that time each of the parties had an equitable claim, and neither of them had anything more. In that situation of their controversy there is but one way to determine between them. Whoever first acquired his right must have the property; for, in case of conflicting equities, precedence of time gives the advantage in right: 1 Bibb, 523. We are of opinion that at the time the defendant received information of a prior incumbrance he was bound to stop and inquire into it; and, after satisfying himself of its existence, to retrace his steps. Instead of doing so, however, we find him, after this notice, combining with Clark, and assisting him in inducing the tenant of the complainant to give up possession. We see him, after this notice, hastening to the house of Clark to procure from him the legal title. Under these circumstances, the court cannot but consider the defendant a *mala fide* purchaser, whose

claims to the property in question must yield to the prior equitable right of the complainant.

The court entered a decree in favor of the complainant.

NOTICE OF SECRET VICES obtained at any time before the payment of the purchase-money will bind the purchaser; he cannot be protected as a purchaser without notice: *Freeman on Executions*, sec. 344; *Roseman v. Miller*, 84 Ill. 297; *Palmer v. Williams*, 24 Mich. 328; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Kitteridge v. Chapman*, 36 Iowa, 348; *Fraim v. Frederick*, 32 Tex. 294. "In fact, the mere parting with value seems not to be sufficient. The whole consideration agreed to be paid must, according to the majority of the authorities, have been paid before notice. This rule is undoubtedly harsh, and a disposition is evident where part of the consideration is paid before notice to protect the purchaser *pro tanto*." *Freeman on Executions*, sec. 344. In *Fessler's appeal*, 75 Pa. St. 433, it appeared that one thousand dollars had been paid on a contract for the purchase of land before notice of plaintiff's claim was received. To the extent of the sum paid the purchaser was held to be protected. The effect of the discovery of an incumbrance after the purchaser had paid part of the price was considered by Walker, J., speaking for the court in *Baldwin v. Sager*, 70 Ill. 503, 507. He says: "It has been frequently held that payment of a part of the purchase-money, although not sufficient to invest the purchaser with the character of a *bona fide* purchaser, as regards the estate purchased, does give him the right to invoke the aid of the equitable principle, that he who claims equity must do equity, and require reimbursement from the rightful owner, of all moneys paid before notice, as a condition to granting the first purchaser or incumbrancer relief: *Frost v. Martin*, 3 Serg. & R. 423; *Bellas v. McCarthey*, 10 Wata. 47; *Juvenal v. Jackson*, 2 Harris, 519; *Uhrick v. Beck*, Id. 636; 4 Id. 499. The same court also holds that the expenditure of money on the premises in their improvement by the purchaser, when no portion of the purchase-money has been paid, if done before notice, entitles the vendee to the same rights: *Boggs v. Varner*, 6 W. & S. 469. And it seems that protection will be given in some form for all payments and improvements made before notice, although payment in full may be required to constitute a good bar by plea to the bill: *Farmer's Loan and Trust Co. v. Maltby*, 8 Paige, 361; *Everts v. Agnes*, 4 Wis. 343; *Flagg v. Mann*, 2 Sumn. 486."

Other decisions asserting that a purchaser who pays part of the consideration-money before notice will be protected *pro tanto* are: *Hardin v. Harrington*, 11 Bush. 367; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Kitteridge v. Chapman*, 36 Iowa, 348; *Digby v. Jones*, 67 Mo. 104; *Jewett v. Palmer*, 11 Am. Dec. 401; *Fraim v. Frederick*, 32 Tex. 294. The payment of the consideration in negotiable notes, which have passed into the hands of a third person, is considered payment of "value" so as to protect the purchaser without notice: *Kitteridge v. Chapman*, *supra*; *Digby v. Jones*, *supra*; *Partridge v. Chapman*, 81 Ill. 137; *Baldwin v. Sager*, 70 Id. 503. The protection accorded to a *bona fide* purchaser for value will not be given to one to get the land at a grossly inadequate price; he must have paid a fair consideration, though not necessarily the full value: *Worthy v. Caddell*, 76 N. C. 82.

CLARK'S CASE.

[1 BLACKFORD, 132.]

COVENANTS FOR PERSONAL SERVICE cannot, as a general rule, be specifically enforced, either at common law or by statute. The case of apprentices depends on parental authority; that of soldiers and sailors on national policy.

IDEM.—Where a free negro woman over the age of twenty-one years bound herself by indenture in this state, for a valuable consideration, to serve the obligee as a menial for twenty years, it was held that a specific performance of the contract could not be enforced, and that upon a writ of habeas corpus she was entitled to be discharged from custody.

THAT SERVICE IS INVOLUNTARY, within the meaning of the constitution, is shown by the application to be discharged on habeas corpus.

AN INDENTURE EXECUTED BY A NEGRO or mulatto out of the state of Indiana, is considered void in that state, and can neither be specifically enforced nor made the foundation of an action for damages.

APPEAL from the circuit court. The opinion states the case.

Dewey, for the appellant.

Call, contra.

HOLMAN, J. In obedience to a writ of habeas corpus issued by the Knox circuit court, G. W. Johnston brought before that court the body of Mary Clark (a woman of color), said to be illegally detained by him, and assigned as the cause of her detention that she was his servant by indenture executed at Vincennes, in this state, on the twenty-fourth of October, 1816; which indenture is set out in the return, regularly executed and acknowledged, by which the said Mary (being a free woman), voluntarily bound herself to serve him as an indented servant and housemaid for twenty years. This cause of detention was deemed sufficient by the circuit court, and the said Mary remanded to the custody of the said Johnston. She has appealed to this court.

This application of Mary Clark to be discharged from her state of servitude, clearly evinces that the service she renders to the obligee is involuntary, and the constitution having determined that there shall be no involuntary servitude in this state, seems at the first view to settle this case in favor of the appellant. But a question still remains, whether her service, though involuntary in fact, shall not be considered voluntary by operation of law, being performed under an indenture voluntarily executed. This indenture is a writing obligatory. The clause in the seventh section of the eleventh article of the constitution that

provides that no indenture hereafter executed by any negro or mulatto without the bounds of this state shall be of any validity within this state, has no bearing on it. An indenture executed by a negro or mulatto out of this state is by virtue of this provision utterly void, and can be set up neither as a demand for the services therein specified, nor as a remuneration in damages for a non-performance. But the constitution having confirmed the liberty of all our citizens, has considered them as possessing equal right and ability to contract, and without any reference to the color of the contracting parties, has given equal validity to all their contracts when executed within the state. We shall therefore discard all distinctions that might be drawn from the color of the appellant, and consider this indenture as a writing obligatory, and test it in all its bearings by the principles that are applicable to all cases of a similar nature. It is a covenant for personal service, and the obligee requires a specific performance.

It may be laid down as a general rule, that neither the common law nor the statutes in force in this state recognize the coercion of a specific performance of contracts. The principal, if not the only, exceptions to this general rule are statutory provisions, few, if any, of which are applicable to this state, and none of them have any bearing on this case. Apprentices are compellable to a specific performance of the articles of apprenticeship, but their case rests on principles of a different nature. They are not considered as performing a contract of their own, but acting in conformity to the will of those whose right and duty it was to exact obedience from them. That right and duty existed by nature in the parent, and are, by legal regulations, transferable to the master during the minority of the child; and when transferred, either by the parent or those who stand *in loco parentis*, the duty of obedience arises, and is enforced on the ground of parental authority, and not on the principle of a specific performance of contracts, and cannot be urged as an exception to the general rule, that the coercion of a specific performance of contracts is not contemplated in law. The case of soldiers and sailors depends on national policy, and cannot be used in the elucidation of matters of private right.

There are some covenants that may be specifically enforced in equity, but they are of a very different nature from the contract before us. They are mostly covenants for the conveyance of real estate, and in no case have any relation to the person. But if the law were silent, the policy of enforcing a specific per-

formance of a covenant of this nature would settle this question. Whenever contracting parties disagree about the performance of their contract, and a court of justice of necessity interposes to settle their different rights, their feelings become irritated against each other, and the losing party feels mortified and degraded in being compelled to perform for the other what he had previously refused, and the more especially if that performance will place him frequently in the presence or under the direction of his adversary. But this state of degradation, this irritation of feeling, could be in no other case so manifestly experienced as in the case of a common servant, where the master would have a continual right of command, and the servant be compelled to a continual obedience. Many covenants, the breaches of which are only remunerated in damages, might be specifically performed, either by a third person at a distance from the adversary, or in a short space of time. But a covenant for service, if performed at all, must be personally performed under the eye of the master, and might, as in the case before us, require a number of years. Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences as a state of absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling more discordant and irritating than slavery itself.

Consequently, if all other contracts were specifically enforced by law, it would be impolitic to extend the principle to contracts for personal service. Very dissimilar is the case of apprentices. They are minors, and for the want of discretion are necessarily under the control of parents, guardians, or masters, and obedience is exacted from them, whether considered as children, wards, or apprentices. They are incapable of regulating their own conduct, and are subjected by nature and by law to the government of others; and that government, instead of humbling and debasing the mind, has a tendency to give it a regular direction and a suitable energy for future usefulness. But it is not the master who in this case applies for legal aid. He has not appealed to a court of justice to obtain a specific performance of this indenture. All he asks from the constituted authorities is, that they would withhold their assistance from his servant. Does this alter the case in his favor? Is it more consistent with good policy that a man possessing the power should be left to enforce a specific performance of a contract in his own behalf, than that the officers of justice, on a full con-

sideration of his case, should enforce it for him? These questions are not only easily answered in the negative, but their reverse is unquestionably true. Deplorable indeed, would be the state of society, if the obligee in every contract had a right to seize the person of the obligor and force him to comply with his undertaking. In contracts for personal service, the exercise of such a right would be most alarming in its consequences. If a man, contracting to labor for another a day, a month, a year, or a series of years, were liable to be taken by his adversary and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party, and abject humiliation in the other. We may, therefore, unhesitatingly conclude, that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law. It presents a case where legal intendment can have no operation. While the appellant remained in the service of the obligee without complaint, the law presumes that her service was voluntarily performed, but her application to the circuit court to be discharged from the custody of her master, establishes the fact that she is willing to serve no longer, and, while this state of the will appears, the law can not, by any possibility of intendment, presume that her service is voluntary. The case of an apprentice presents a different state of things. The minor is considered as having no legal will. He has neither the power nor the right of choosing whether he will obey or disobey the commands of his master. The law, therefore, on account of the immaturity of his will, can not presume that any of his services are involuntarily performed. The appellant in this case is of legal age to regulate her own conduct, she has a right to the exercise of volition, and, having declared her will in respect to the present service, the law has no intendment that can contradict that declaration. We must take the fact as it appears, and declare the law accordingly. The fact then is, that the appellant is in a state of involuntary servitude, and we are bound by the constitution, the supreme law of the land, to discharge her therefrom.

By COURT. The judgment is reversed with costs, and the woman discharged.

"CONTRACTS FOR PERSONAL SERVICES, where the acts stipulated for require special knowledge, skill, ability, experience, or the exercise of judg-

ment, discretion, integrity, and the like personal qualities, on the part of the employees, or where the services are confidential; in short, where the full performance, according to the spirit of the agreement, rests in the individual will of the contracting party, courts of equity have no direct and efficient means of affirmatively compelling a specific execution; at most they could only order the acts to be done, and punish the defendant refusing by fine or imprisonment." Pomeroy on Contracts, sec. 310, citing *De Rivafrinoli v. Corsetti*, 4 Paige, 264; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Haight v. Badgley*, 15 Barb. 501; *Marble Co. v. Ripley*, 10 Wall. 339; *Randall v. Latham*, 36 Conn. 48; *Richmond v. Dubuque R. R.*, 33 Iowa, 422; *Cooper v. Pena*, 21 Cal. 404, 411; *Ford v. Jermon*, 6 Phila. 6.

The same author, in section 24, states that the modern English rule is, to enforce contracts for personal acts, by means of injunction; that is, "although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach." And in England it is not necessary that the contract should contain a negative clause as a prerequisite to the exercise of this jurisdiction. This method of enforcing contracts has been adopted by some of the courts of this country: *Gillis v. Hall*, 2 Brews. 342; *Parker v. Garrison*, 61 Ill. 250; *Frank v. Brunseman*, 8 W. Va. 462; *Richardson v. Peacock*, 26 N. J. Eq. 40. The distinction made is that where the services are purely mechanical, the remedy for the breach of a contract to render them, is at law; but where the services to be performed involve the exercise of peculiar skill or intelligence, equity will interfere by means of an injunction to enforce the performance: 3 Wait's Actions and Defenses, 754. In *Hayes v. Willis*, 11 Abb. (N. S.) 167, and *Daly v. Smith*, 49 How. 150, contracts on the part of actors to act at plaintiff's theatres, and nowhere else, for a given period, were substantially enforced by the granting of injunctions to prevent defendants from acting at other places of amusement.

LASSELLE v. BARNETT.

[1 BLACKFORD, 150.]

ESTOPPEL BY STATEMENTS.—A mortgagee who, by representing that the mortgage had been discharged, induces another to take a mortgage of the premises, cannot thereafter set up a claim to the mortgaged property, nor can his assignee with notice to the prejudice of the second mortgagee.

REVIVAL OF MORTGAGE.—If land be conveyed in satisfaction of a mortgage and the title subsequently prove defective, the defect may be the subject of a new demand, but will not operate to revive the original contract without the consent of the mortgagor, nor with his consent to the prejudice of an intermediate mortgagee.

THE REGISTRY OF A MORTGAGE is in judgment of law, notice of such mortgage to subsequent purchasers and mortgagees.

BILL in equity transferred from the circuit court previously to a decree, on account of the interest of the circuit judge. The opinion states the case.

Hurst, for the complainant.

Dewey, contra.

HOLMAN, J. Dubois held a mortgage on a house and lot in Vincennes, described as facing three streets and the Wabash river, and between Fort Knox and Chappards, the property of Bazayon. Bazayon was indebted to J. and F. Lasselle in the sum of seven hundred and thirty dollars and seventy-five cents, and proposed giving them a mortgage on the same premises, informing F. Lasselle (who was transacting the business), of the mortgage of Dubois, but said it was discharged. Lasselle applied to Dubois to learn the nature and extent of his claim, informing him at the same time that he was about to take a mortgage on the same premises. Dubois informed him that his mortgage was settled, and that Lasselle might take his mortgage with safety. Lasselle resided at Detroit, and was urgent with Dubois to deliver up his mortgage or enter satisfaction on it, as he (Lasselle), wished his business done that he might return home. Dubois replied that he could not do it for a few days, he having first to make an arrangement or settlement with Bazayon, but that Lasselle might rest assured that it should be done. Lasselle took his mortgage, had it recorded at Vincennes, and returned to Detroit. This was transacted in 1809. About this time Dubois frequently spoke of his mortgage as being discharged. He afterwards set up a claim to about four hundred dollars on the mortgage. This sum he claimed in consequence of his failing to obtain what he considered a legal title for a tract of land which he had purchased of Bazayon, called the Bourdeleau tract. But whether this tract of land was sold by Bazayon, in part discharge of the mortgage debt, or to pay a debt subsequently contracted, is left by the testimony somewhat doubtful. Some doubt may also be considered as resting on the title that Dubois received for the Bourdeleau tract of land. Bazayon had purchased of P. Bourdeleau, the executor and one of the heirs of A. Bourdeleau, who died seised of the said tract of land. Bazayon died; and Dubois was not satisfied with the title he thus derived through the purchase of Bazayon, inasmuch as there were one or two heirs of A. Bourdeleau whose claims had not been purchased by P. Bourdeleau.

To quiet all dispute, a judgment was obtained against the estate of A. Bourdeleau, and this tract taken and sold under execution, and Dubois became the purchaser and received the sheriff's deed. The consideration that passed from Bazayon to P. Bourdeleau, for this tract of land, has also been the subject of much altercation, and remains clothed in some uncertainty; but it does not appear that P. Bourdeleau was dissatisfied on

that subject, or had any desire to defeat the title of Bazayon or Dubois to the Bourdeleau tract. Dubois took possession of the land, exercised ownership over it for some time, and sold a cabin that stood upon it; and, when the deed was supposed to have been destroyed in the recorder's office in Vincennes, which was burnt in 1814, he advised with counsel about perpetuating his title. But afterwards, without the consent of the representatives of Bazayon, he abandoned the said tract of land, gave up to P. Bourdeleau such of the title papers as were in his possession, and set up a claim under the mortgage. In 1813, the said house and lot were taken in execution as the property of Bazayon, and sold, and Barnett became the purchaser for a small sum of money, and received a deed of conveyance from the sheriff; and afterwards, as he states in his answer, he heard of the existence of the aforesaid mortgages, and made inquiries respecting them, in order to purchase one or the other for the purpose of securing his own title. He discovered the mortgage of Dubois to be the older, and, after learning from him all the transactions relative to the Bourdeleau tract of land, and receiving an assurance that upwards of four hundred dollars were due on his mortgage, he purchased it in the year 1815; and, by agreement with Dubois, afterwards had the mortgage foreclosed in the name of Dubois, and the house and lot sold to satisfy the balance said to be due; and became the purchaser for the sum of two hundred and thirty dollars, and received the sheriff's deed under the sale. In 1816, F. Lasselle, surviving partner of J. & F. Lasselle, had his mortgage foreclosed, and the same premises ordered to be sold. Barnett opposed the sale, and a jury was called by the sheriff to determine on their liability to be sold. The verdict was in favor of the claim of Barnett, and the sale was thereby prevented. Lasselle then filed his bill to set aside the mortgage of Dubois, the judgment of foreclosure, sale and deed executed to Barnett; or to have the foreclosure opened, and his mortgage preferred, etc.; with a prayer for general relief.

Having collected these facts and allegations from the intricate and voluminous bills, answers and exhibits, we are of opinion that the declarations of Dubois to Lasselle, that his mortgage was satisfied, and that Lasselle might safely take a mortgage on the house and lot, are obligatory on him; and, whether he had received satisfaction or not, that he could not afterwards set up a claim under the mortgage to defeat the claim of the Lasselles. This position is supported, in prin-

ciple, by a long list of cases, both at common law and in chancery: Pow. on Mort. 466, 472; 1 Fonb. 153, 164, 165, and the authorities there cited; 8 T. R. 50; 2 Vern. 370; 2 Atk. 49. It is equally clear, that if the sale from Bazayon to Dubois, of the Bourdeleau tract of land, was in part discharge of the mortgage, that contract appears to have been executed both by title and possession. And if that title was defective, the defect might be the subject of a new demand, but could not operate in reviving the original contract. Consequently, it was not with Dubois, without the consent of Bazayon or his representatives, so to abandon the title and possession of the Bourdeleau tract of land as to authorize a claim against the estate of Bazayon. Nor could such an act of abandonment, even with the consent of Bazayon or his representatives, by any means affect the claim of the Lasselles. If Dubois had a precedent claim under his mortgage, and agreed to receive a legal title to the Bourdeleau tract in extinguishment of his claim; and in pursuance of said agreement, did receive a title which he considered to be legal, his claim under his mortgage was at an end; and the mortgage of the Lasselles, which had been suspended by the operation of his, immediately acquired a vested right to precedence, which right could not afterwards be divested by any act or agreement to which the Lasselles were not a party. Consequently, in either of these views, the right of Dubois, under his mortgage, was clearly suspended by the mortgage of the Lasselles.

The conduct of Dubois in disposing of the benefit of his mortgage to Barnett, and through the agency of Barnett procuring a judgment of foreclosure and sale of the mortgaged premises, was calculated to defeat the claim of the Lasselles; and is therefore strongly marked with fraud. The claim of Barnett rests on principles somewhat different. He purchased the house and lot at sheriff's sale, when sold under execution as the property of Bazayon, in 1813. It is unnecessary to inquire whether the equity of redemption, which was all the interest remaining in Bazayon, was a legal subject of execution, inasmuch as the mortgage of the Lasselles, being of record, must be presumed to have been known to Barnett at the time he made this purchase. He is therefore to be considered as a purchaser with notice of their mortgage, and can have no pretense in equity to be preferred before it. In this view of the case, we have not considered the effect of the loss of this record by the destruction of the recorder's office at Vincennes,

because the record was in existence at the time the purchase was made, and its subsequent loss could have no possible bearing on this part of the case. The right that Barnett acquired under the mortgage, would also be dependent on the notice he had of the nature and extent of the right of Dubois, if he had taken a regular assignment of the mortgage. But instead of taking an assignment, he contracts with Dubois for the benefit of the mortgage, and proceeds in the name of Dubois to obtain that benefit; and cannot, therefore, as a purchaser without notice, claim the advantage arising from the legal operation of the mortgage; but must take it subject to every equitable consideration to which it would have been subject if it had remained for the benefit of Dubois. But if Barnett had taken an assignment of the mortgage of Dubois, his situation would not have been materially altered; for he must have been considered as a purchaser with notice of the superior claim and prior equity of the Lasselles. Although it is not manifest that he was informed of the first declarations of Dubois to Lasselle, or knew anything of the repeated statements he had made to others, that his mortgage was discharged; yet he was well acquainted with the existence of the mortgage of the Lasselles, and understood the nature and particulars of the contract between Bazayon and Dubois respecting the Bourdeleau tract of land, which afforded him sufficient information to put him on his guard. And having purchased under these circumstances, the interest he acquired, if any, should be suspended until the mortgage of the Lasselles is satisfied. His agency in the foreclosure of the mortgage of Dubois, and in the subsequent proceedings, was also a fraud upon the Lasselles. The price of two hundred and thirty dollars, for which the mortgaged premises were sold, when alleged in the bill to be worth two thousand or two thousand and five hundred dollars, although not of itself conclusive evidence of fraud, yet serves to heighten the fraudulent aspect of the whole case. And whatever might be the condition of an innocent purchaser under the sale, the condition of Barnett, by whose agency and for whose benefit it was effected, is by no means altered thereby. The deed he procured from the sheriff under that sale is consequently fraudulent and void.

By COURT. It is decreed that the sale under the judgment of foreclosure and order of sale obtained by Barnett in the name of Dubois, be set aside at Barnett's costs; that Barnett, within thirty days after service of a copy of this decree, relin-

quish the premises so bought under the order of sale, with special warranty, to the legal representatives of Bazayon, the conveyance to take effect from the date of the sheriff's deed executed under the order of sale; that Barnett and the legal representatives of Dubois, deceased, be enjoined from proceeding on the judgment of foreclosure and order of sale, until Lasselle's mortgage with the costs be paid; provided Lasselle proceed within twelve months to obtain the amount of his demand; and that Barnett and the executrix of Dubois, deceased, pay costs, etc.

REVIVOR OF MORTGAGES.—It is stated in *Jones on Mortgages*, that "a mortgage, after payment, becomes *functus officio*, and neither the mortgagee nor any one else has, as a general rule, any power to transfer it as a subsisting security, or to revive it to secure the same, or any other liability: *McGiven v. Wheelock*, 7 Barb. 22; *Mead v. York*, 6 N. Y. 449; *Ledyard v. Chapin*, 6 Ind. 320; *Thomas's appeal*, 30 Pa. St. 378; *Perkins v. Sterne*, 23 Tex. 561; *Fewell v. Kessler*, 30 Ind. 195; *Pellon v. Knapp*, 21 Wis. 63." If the debt has been satisfied within the terms of the mortgage, the lien which was given as security is thereby discharged, and cannot be revived to the prejudice of third persons: *Marvin v. Vedder*, 5 Cow. 671; *Mead v. York*, 6 N. Y. 449; *Bowman v. Manter*, 33 N. H. 530; *Champney v. Coope*, 32 N. Y. 543; *Gardner v. James*, 7 R. I. 396; *Carlton v. Jackson*, 121 Mass. 592. As between the parties to the mortgage, however, their intent in regard to the payment is to be considered; *Champney v. Coope*, 32 N. Y. 543; where it is laid down "that the doctrine is well settled by authority in relation to mortgages that if the amount due thereon is paid, the intent of the parties in making such payment, whether to extinguish or keep alive the security, will govern." Without the assent of the mortgagor, the mortgage, if once paid, cannot be transferred so as to become a security for other indebtedness: *Beardsley v. Tuttle*, 11 Wis. 74; *Spencer v. Fredendall*, 15 Id. 666. But the parol agreement of the parties has been held not to be sufficient to continue the mortgage in force: *Merrill v. Chase*, 3 Allen, 339; *Johnson v. Anderson*, 30 Ark. 745.

Although the continuance of a mortgage by oral agreement, as security for new indebtedness is not permitted in Massachusetts, yet, if such an agreement has been made and money has been advanced in consequence thereof by the mortgagee to the mortgagor, a court of equity will not aid the latter, or one claiming under him with knowledge of the facts, in obtaining a discharge of the mortgage: *Joslyn v. Wyman*, 5 Allen, 62; *Stone v. Lane*, 10 Id. 74; *Upton v. National Bank of South Reading*, 120 Mass. 153. In the last citation it is said, as between the mortgagee and a subsequent mortgagee, an attaching creditor or bona fide purchasers, or even if the prior mortgagee had brought an action at law to foreclose, that evidence of the parol agreement would not be admissible.

After a mortgage has once been discharged it would seem that to revive it, the same formalities are necessary, as were requisite to create the mortgage in the first instance, although in some instances effect may be given to an instrument made with the intention of reviving the security by declaring it to be an equitable mortgage: *Jones on Mortgages*, sec. 946; *Peckham v. Hauldock*, 36 Ill. 38.

McCLURE v. BENNETT.

[1 BLACKFORD, 189.]

TRUSTEES OF A CORPORATION who executed a promissory note to which they signed their several names as trustees, and affixed their individual seals, were held liable personally.

APPEAL from the circuit court, in an action of debt against McClure and others, upon the following sealed note: "For value received, this second of October, 1820, we, the trustees of the first presbyterian congregation in the town of Madison, Indiana, do bind ourselves and our successors in office to pay Brook Bennett, or order, on demand, seven hundred and sixty-nine dollars, with interest from the twenty-third of May, 1820. Witness our hands and seals, etc. John Ritchie. [Seal.] David McClure. [Seal.] James Wilson. [Seal.] Trustees of the first presbyterian congregation in Madison."

Dewey, for the appellants.

Sullivan and Nelson, contra.

HOLMAN, J. The declaration in this case sets forth a writing under seal, by which John Ritchie, David McClure, and James Wilson, by the style and description of "trustees of the first presbyterian congregation in the town of Madison," bound themselves and their "successors in office" to pay Brook Bennett seven hundred and sixty-nine dollars. To this note they severally signed their names and affixed their seals as trustees of the first presbyterian congregation in the town of Madison. The defendants pleaded that a number of persons had associated together as a religious society, and assumed the name and style of the first presbyterian congregation in the town of Madison; that, being so associated, they, by virtue of an act of assembly entitled "An act for the appointment of trustees to receive deeds for lots or lands given or purchased for the use of schools or meeting houses," had proceeded in conformity to said act to elect five trustees, to wit, the three defendants, together with Samuel Smock and William Hendricks, who had thereby become a body corporate; and that the defendants, being a majority of the trustees, in their corporate capacity and not in their individual right, had given the writing declared on. And they also averred that the writing was given for materials furnished and labor performed in erecting a meeting-house for said presbyterian congregation. The circuit court considered the plea

as no answer to the declaration, and gave judgment for the plaintiff.

In referring to the act of assembly on this subject, we discover no powers given to the trustees of congregations, societies, or churches, but what relate to the receiving, holding, or transferring of titles to any real property to which the congregation, society, or church may be entitled by gift, grant, or otherwise. A power to make a contract for building a meeting-house, or for the payment of money for materials furnished or labor performed in erecting such a building, is not contemplated by the act. This contract must therefore be considered independently of the act of assembly, and receive the same construction to which it would have been subject if the act had never passed. And, when thus considered, it has received a fair construction in the case of *Taft v. Brewster*, 9 Johns. 334 [6 Am. Dec. 280]. In that case, Brewster, Loomis and Coats had executed to Taft a bond signed and sealed by them respectively, as trustees of the baptist society of the town of Richfield. Special demurrer, because the bond was executed by the defendants in their corporate, and not in their individual capacity. *Per Curiam*, "The bond must be considered as given by the defendants in their individual capacity. It is not the bond of the baptist church, and if the defendants are not bound, the church certainly is not. The addition of trustees to the names of the defendants is a mere *descriptio personarum*." As far as this case goes, it is not only applicable but conclusive. There is another feature in this contract. The defendants here bind themselves and "their successors in office;" but as this note was executed by them in their individual capacity, they could have no successors in office, consequently these words are only surplusage. The plea was therefore no bar to the action, and was justly disregarded by the circuit court.

By COURT. The judgment is affirmed, with one per cent. damages and costs.

In *Randall v. Van Vechten*, 10 Am. Dec. 193, a committee of a municipal corporation, describing themselves as such, made a contract for the survey of the city and affixed thereto their individual signatures and seals, and it was held that assumption would lie against the corporation, it appearing that the common council had ratified and adopted the contract; but that covenant would not lie, as the contract was not under the corporate seal.

ARMSTRONG v. JACKSON.

[1 BLACKFORD, 210.]

PLEADING OUSTER IN EJECTMENT.—In the declaration in ejectment the demise was laid to have been made in October of a certain year, and the ouster to have taken place afterwards, to wit, in April of the same year. The declaration was held good and the *scilicet* repugnant and void.

AT A SHERIFF'S SALE OF REALTY, the title of a *bona fide* purchaser cannot be impeached for any error in the judgment, nor on account of the execution having issued out of season, nor for any fault of the sheriff in not pursuing the statute as respects the inquest, advertisement of sale, etc. But to support his title the purchaser must show the sale to have been authorized by the judgment of a court of competent jurisdiction and by the kind of execution which the statute prescribes.

ERROR to the circuit court. The opinion states the case.

Lane and Test, for the plaintiff.

Caswell, *contra*.

BLACKFORD, J. Ejectment against Armstrong for a lot of ground in Lawrenceburgh. Plea not guilty. At the trial the evidence of the plaintiff below was objected to because the ouster was laid in the declaration to have taken place previously to the demise; but the court overruled the objection. After the plaintiff had closed his testimony the defendant offered in evidence the record of a judgment on attachment against the lessor, a writ of *fiери facias* thereon, and the sheriff's return; also a deed from the sheriff to the execution-creditor, and a deed from him to the defendant. To the execution and return, and to the deeds, the plaintiff objected, and the court refused to admit them in evidence. Verdict and judgment for the plaintiff below.

The declaration states that the demise was on the first of October, 1819; and that by virtue thereof the plaintiff entered and was possessed of the premises until the defendant afterwards, that is to say, on the second of April, in the year aforesaid, ejected him. Here the *videlicet* is in direct contradiction to the word afterwards, and the precedent matter, and therefore whatever comes under the *videlicet* must be rejected as surplusage and void. This question has been so long settled that it is a subject of surprise to the court that the plaintiff in error should insist upon the objection. The cases of *Adams v. Goose*, Cro. Jac. 96; and *Wyat v. Aland*, 1 Salk. 325, are exactly in point; and there are many others to the same effect: *Vide Dakin's case*, 2 Wms. Saund. 290, and note 1. Besides, the

statute precludes any such objection: Stat. 1817, p. 41. The objection, therefore, to the evidence of the plaintiff below, on account of this informality in the declaration, was very correctly overruled by the circuit court.

The indorsement on the *feri facias* by the sheriff, and the statement in the bill of exceptions, both show that the lot was sold by the authority alone of that execution. The admissibility of the *feri facias*, therefore, as evidence in support of the title of the defendant below, rests upon the same question with the admissibility of the sheriff's deed, which recites that the lot was sold by virtue of the *feri facias*. That question is, whether the sheriff's sale by authority of a judgment in attachment, and a writ of *feri facias* was valid? The question seems to the court a plain one. Such was the feudal policy of the common law that the freehold was never subject to be sold for debt by virtue of any kind of execution. It could not even be extended except in favor of the king, and against an heir on the obligation of his ancestor. The writ of *elegit* is of statutory origin. Even at this day real estate cannot be sold in England on execution for debt. The only reason why the sheriff could ever sell it in this country was because the authority was given to him by statute, whenever, after judgment, he was commanded by a certain kind of execution. At first the execution warranting the sale was such a one as that before us; but in 1810 the law was changed, and then no execution authorized the sheriff to sell real property, but a *venditioni exponas*. The power of the sheriff is derived from the execution; and the authority of the execution to warrant the sale is derived from the statute. Suppose the sheriff had sold without any execution, the sale would clearly have been void. It is the same thing whether he sells with an execution which gives him no power, or whether he sells without any execution at all. The execution in this case gave the sheriff no power to sell the premises in dispute, because there was no law authorizing it; and the sale was consequently void. It is contended by the plaintiff in error that the circumstance of this judgment being on attachment makes it a different case. We do not think so. The statute of 1810, which was the law when this sale took place, is general as to the sheriff's having no authority to sell real estate, but by virtue of a *venditioni exponas*; and whether the suit was commenced by an attachment, or in any other way, can make no difference. On a judgment in attachment, real property cannot be sold but by the same kind of execution that

authorizes the sale in other cases. That was the law previously to the act of 1810, and it still continues the same.

The cases of *Beardon v. Searcy's Heirs*, 2 Bibb, 202; *Lawrence v. Speed*, Id. 401; *Hayden v. Dunlap*, 3 Id. 216; and *Jackson v. Rosevelt*, 13 Johns. 97, referred to by the plaintiff in error, are, we believe, good law, but not applicable to this case. It is a fair presumption, that the judgment of a competent court which a *bona fide* purchaser sees of record has been correctly rendered, and that execution shown him in the hands of the sheriff, has regularly issued. It may be safely presumed too, that the sheriff has done his duty in obeying the directions of the statute as respects the inquest, the advertisement of sale, etc. The cases cited prove nothing more: *Vide*, also, *Doe v. Thorn*, 1 Mau. & Sel. 425. It is important to the interests of both plaintiffs and defendants that the title of a *bona fide* purchaser at sheriff's sale should not be affected on account of any error or irregularity in the judgment or execution.

But the sale of property without any judgment, or without any execution apparently authorizing such sale, is entirely a different thing. Here the kind of execution itself does not exist upon which to found the presumption of its having regularly issued, or of the proceedings under it having been correct. It would be violating the best established principles were we to say that a purchaser at sheriff's sale has a right to presume the existence either of a judgment, or of the proper kind of execution. In an action of trespass against the sheriff, an execution from a competent court authorizing his conduct is a sufficient justification, where the suit is by the execution debtor, but it is at the peril of the party at whose suit the execution is made that it has regularly issued and that there is a record to warrant the writ: *Barker v. Braham*, 3 Wils. 376. In an action of ejectment against the purchaser of lands at sheriff's sale the vendee cannot justify his possession without at least showing that there was an execution authorizing the sale, and producing a copy of the judgment rendered by a court of competent jurisdiction: *Lessee of Wilson v. McVeagh*, 2 Yeates, 86; *Wilson v. Conine*, 2 Johns. 280. In the case before us there was no *venditioni exponas*, which, by the statute of 1810, was the only kind of execution that could warrant the sale under consideration. The sheriff was not, therefore, authorized to sell, and the purchaser acquired no right to the property. This opinion is supported by decisions in Pennsylvania exactly in point, under a statute the same with ours of 1810: *Lessee of Porter v. Neelan*,

4 Yeates, 108; *Lessee of Glancey v. Jones*, Id. 212. If the purchaser at sheriff's sale acquired no right to the premises in question, it follows, of course that his deed to the defendant was no evidence of title.

By Court. The judgment is affirmed with costs.

LEWIS v. BRACKENRIDGE.

[1 BLACKFORD, 220.]

LAWS IMPAIRING CONTRACTS.—The constitutional provision, that “no law impairing the validity of contracts shall ever be made,” extends to all rights arising under all contracts, whether written or parol, whether express or implied, whether arising from the stipulation of the parties or accruing by operation of law.

ISSUE.—This constitutional provision must be considered as rendering void any statute which is retrospective and which destroys a vested right of action arising *ex contractu*. But the legislative power of limiting the time, and regulating the manner in which rights shall be legally demanded, does not interfere with the rights themselves nor affect the construction given to that provision.

STATUTES, HOW TO OPERATE.—It is a general rule, independently of the constitution, that statutes are to have a prospective operation only, and it is conclusively settled that a statute should not be construed to operate retrospectively, if a vested right be thereby destroyed.

THE UNDERTAKING OF SPECIAL BAIL is that the principal shall satisfy the judgment of the court or render his body in execution, or that the bail will do it for him. And if the principal fail to satisfy the judgment and cannot be found, the bail becomes absolutely liable for the amount of the judgment.

JUDGMENT-CREDITOR'S RIGHT AGAINST BAIL VESTED.—When the bail are absolutely fixed and have no further time, the right of the judgment-creditor to his debt from them is a vested right, arising *ex contractu*, of which no subsequent legislative act can divest him. Accordingly an act authorizing the surrender of the principal in discharge of the bail at any time before judgment against them can have no retrospective operation, but must be construed to apply to cases only arising subsequently to the statute.

ERROR to the circuit court. The opinion states the case.

Casswell, for the plaintiff.

Test, *contra*.

HOLMAN, J. Lewis commenced an action of debt against Brackenridge, on his recognizance, as special bail for Oliver. The *capias* was returned executed, on the first day of March

term, 1820. After various continuances were had, and several issues made up, the defendant, on the ninth day of the March term, 1822, moved to dismiss the suit at his costs, on the ground that Oliver, the principal, had surrendered himself into custody, in discharge of his bail, before judgment was rendered against the bail; which surrender, agreeably to a bill of exceptions, was made during that term. The court sustained the motion and dismissed the suit. This suit was dismissed by virtue of an act of the assembly, approved December 26, 1821, which provides that in all cases in favor of special bail, if the principal is surrendered before judgment against the bail, the suit shall be dismissed at the costs of the bail.

The principal question arising out of those proceedings is, is this case embraced by this act of assembly? The suit was commenced in February, 1820, and the act passed in December, 1821; and will this act operate to destroy the claim which the plaintiff had been pursuing, by a legal course, for nearly two years? This question is of very high importance; and in order to give it an answer, we will divide it, and inquire, first, whether an act of assembly should be so construed as to destroy a vested right of action; and, secondly, whether the plaintiff at the time this act was passed was in possession of such a vested right.

In prosecuting the first inquiry, we find that the eighteenth section of the first article of the constitution provides, that "no law impairing the validity of contracts shall ever be made." From which we learn, that is, all obligations created by them, and all rights arising under them are to be held sacred, and forever to continue unaffected by legislative interference. The law under which the contract was executed is to be and remain the only rule by which the contract shall be construed. The obligation shall not be increased, nor the rights diminished, by any act of future legislation. Thus far the case appears clear. But what rights are thus secured from legislative interposition by this guarantee of the validity of contracts? There can be no question but this guarantee extends to all rights, arising under all contracts, whether written or parol, whether express or implied, whether arising from the stipulation of the parties, or accruing by operation of law. There can be no question but it extends to all rights which are said to arise *ex contractu*, as contradistinguished from those arising *ex delicto*. Without inquiring whether it will admit of a further extension, we would take this view of the constitution as a rule to guide us in the construction of any act of assembly which would seem to

contravene this constitutional provision. And this rule would prohibit the passage of an act which would destroy any vested right of action that had arisen under any pre-existing contract; or if an act were passed in such general terms as should apparently embrace any such vested right of action, it would give it such a limited construction as to allow it a prospective and not a retrospective operation, so as to embrace future rights of action only, leaving all vested rights of action to the undisturbed control of the pre-existing laws. The power which legislative bodies have assumed of limiting the time and regulating the manner in which rights shall be legally demanded, does not interfere with the rights themselves, nor in any manner affect this rule of construction.

But, independently of this clause in the constitution, it is a general rule, that statutes should be so construed as to have a prospective operation only. There are many exceptions to this general rule, which it is at present unnecessary to enumerate, inasmuch as the question is not how far an act of assembly may be retrospective, but whether it should be construed to have such a retrospect as to destroy a vested right of action. That it should not be so construed as to operate retrospectively in destroying such a vested right, is a principle clearly maintained by writers of the highest authority, and conclusively settled in a variety of decided cases: See 6 Bac. 370; 1 Bl. Comm. 46; Hale, 346; *Wilkinson v. Meyer*, 2 Ld. Raym. 1352; *Calder v. Bull*, 3 Dall. 386; *Ogden v. Blackledge*, 2 Cranch, 272. Besides which we shall notice three cases which rest solely on this principle, and establish it in unequivocal terms. The first is the case of *Gilmore v. The Executor of Shooter*, which seems to be a leading case. It is reported in 2 Mod. 310; 2 Lev. 227; 1 Vent. 330; 2 Show. 16; Jones, 108; and is referred to as unquestionable, both in England and the United States. See 6 Bac. 370; 4 Burr. 2460; 7 Johns. 477; *Dash v. Van Kleeck* [5 Am. Dec. 291]. After the passage of the statute of 29 Car. 2, declaring that after the twenty-fourth of June, 1677, no action should be brought to charge any person on any promise made in consideration of marriage, unless the same were in writing; and after the twenty-fourth of June, 1677, this action was brought by Gilmore, on a verbal promise, in consideration of a marriage made before the statute. It was then held by the court that although the expressions of the statute were positive that no such action should be brought, the statute should not have a

retrospect to take away an action to which the plaintiff was before entitled.

The next is the case of *Couch, qui tam. v. Jeffries*, 4 Burr. 2460. After a verdict in an action for the penalty for not paying the stamp duties on an indenture of apprenticeship, a statute was made discharging from the penalties, provided said duties were paid before a particular day; agreeably to which provision the duties in this case had been paid; yet the court gave judgment for the plaintiff, holding that he had a vested right to the penalty before the making of the statute, which right was not taken away by the general words of the statute.

The third case we shall thus notice is that of *Dash v. Van Kleeck*, 7 Johns. 477. An act of assembly authorized the sheriff to take bail of execution debtors for their keeping within the gaol liberties. On this act the court decided, in the case of *Tillman v. Lansing*, 4 Johns. 45, that when such bail was given, and the debtor departed from the liberties, an action lay against the sheriff for an escape, and that he could not defend himself, as at common law, by showing that the debtor had returned to the liberties, and was again in custody before the commencement of the action. After this decision, and after this action was brought against the sheriff for an escape, in a case where the debtor had returned to the liberties, and had been a long time in custody before the action was commenced, the legislature passed another act, declaring that the above-mentioned act "should not be so construed as to prevent any sheriff, in cases of escape, from availing himself, as at common law, of any defense arising from a return of the prisoner into custody before the action was commenced for the escape." And the question was, whether this last act embraced that case so as to destroy the plaintiff's right of action. There was no doubt but the legislature apparently intended to embrace that and all similar cases, which occasioned a division of the court. Spencer and Yates, JJ., holding that the case was within the act; but Kent, C. J., and Thompson and Van Ness, JJ., decided that the plaintiff's right of action was vested, and was not embraced by the act, and gave judgment for him accordingly. This case was examined at great length, the judges giving their opinions *seriatim*. The whole doctrine on the subject is set forth so fully, so clearly, and so conclusively, in the learned opinions of Chief Justice Kent and others, as not only to satisfy our minds of the correctness of this principle, but also to leave no room for argument on the subject. We feel, therefore, warranted in deciding

that an act of assembly should never be so construed as to divest a right of action, that had accrued and was in a legal course of investigation prior to its enactment, and, more particularly, when that right had arisen under a pre-existing contract.

It now remains for us to examine into the right of Lewis against Brackenridge, and to determine whether, at the time of the passage of this act of our legislature, he had such a vested right of action as could not be affected by the act. The undertaking of the bail is that the principal shall satisfy the judgment of the court, or render his body in execution, or that he will do it for him. When the principal fails to satisfy the judgment, and his body cannot be had in execution by the regular process of law, the bail becomes bound, and, agreeably to a strict construction of his undertaking, is, from the return of such ineffectual process against the principal, absolutely liable for the amount of the judgment. But, inasmuch as his liability arises from the default of another, he has always been highly favored in law and looked upon by the courts of justice with an indulgent eye, so that if the principal is living, a further day is given the bail in which to make the surrender. When the proceeding against him is by action of debt on his recognizance, if the principal be surrendered within eight days in term after the return of the *capias*, he will be discharged, after which time he is said to be fixed, and no further indulgence is given. But this indulgence is neither uncertain nor fluctuating. It was settled at an early stage of the English jurisprudence, and does not depend on the favor of the court. The rights of a plaintiff against the bail are as well settled and as clearly defined as the rights in any other cases of contract whatever.

In this case, Brackenridge had eight days in term, after the return of the *capias*, to render the body of Oliver into custody, which he failed to do, and consequently became fixed, and, so far as his liability depended on a surrender of the principal, became absolutely bound to satisfy the judgment. On the return of the process against Oliver, Lewis had a right to commence his action, but his right to prosecute it to final judgment was defeasible by the surrender of the principal within eight days, *sedente curia*, after the return of the *capias*; when those eight days were expired, his right to prosecute his action to final judgment became absolute.

Agreeably to every principle of law and the cases already cited, there seems to us no question but that the right of Lewis was a vested right, a right as complete and conclusive as that of

the plaintiff in any of the three cases we have particularly set forth. One of those cases was on a verbal promise in consideration of marriage, but suit was not commenced until after the making of the prohibitory statute. Another was for a penalty to which the plaintiff had no claim until his action was commenced. The third was one of those seemingly hard cases where an innocent person was to be made liable for the default of another, when the default had not in fact rendered the plaintiff in a worse situation than he was in before, the debtor having returned to the bounds before the commencement of the suit. So that on the authority of these cases, as well as on general principles, we are authorized in determining, that at the time of the passage of this act, the plaintiff had a vested right of action which could not be divested by the act; and also that his right arose under an express contract and was guaranteed to him by the most rigid construction of the eighteenth section of the first article of the constitution.

It is never to be presumed that a legislative body would transcend its powers, or act contrary to the rules of universal justice. It is equally beyond the rules of a fair presumption, to suppose it would interfere with private rights, so as to do a manifest injury to one individual for the benefit of another. We have, therefore, just ground to presume that the legislature, in the passage of this act, did not intend to destroy any right that had arisen under pre-existing laws. They were aware of the provisions of the constitution. They no doubt understood the general rule that acts of assembly are to operate prospectively. We may, therefore, suppose that although they have used general expressions, seemingly embracing all present, as well as future cases, without any saving of vested rights, yet it was with the intention of regulating future cases, and the rights arising under them only; deeming the present cases, and the rights already vested as sufficiently protected either by the constitution or the well known rules of construing statutes. This case remains in the same situation in which it would have stood if this act had never been passed; and should have regularly progressed in the circuit court, without any reference to the act.

By Court. The judgment is reversed, with costs. Cause remanded for further proceedings.

On the subject of retrospective statutes, see *Goshen v. Stonington*, 10 Am. Dec. 121, and note.

STATE BANK v. THE STATE.

[1 BLACKFORD, 267.]

EFFECT OF SEIZURE OF CORPORATE FRANCHISES.—A seizure of the franchises of a corporation effects its dissolution.

ACTION OF CORPORATE FRANCHISES works a forfeiture of the franchises, but not of the lands or chattels of the corporation.

A JUDGMENT OF SEIZURE OF THE FRANCHISES for a violation of the charter of a corporation should not direct a seizure of the corporate possessions. The better opinion is that such a judgment does not dissolve the corporation, though the seizure of the franchises by execution issued upon the judgment may work such dissolution.

THE EFFECT OF THE DISSOLUTION OF A CORPORATION, at common law, was:

1. That its lands and tenements reverted to the person by whom they were granted to the corporation;
2. Its goods and chattels vested in the crown;
3. The debts due to or from it were extinguished.

ERROR to the circuit court.

The opinion states the case.

Tabbs and Test, for the plaintiffs.

Moore, Dewey and Nelson, contra.

HOLMAN, J. [His Honor first construed several clauses in the charter of the bank, but the opinion thereon expressed being local in its application, it is deemed unnecessary to insert it.] The most of the cases to be found in the books against corporations, are where the corporations have been created for the purposes of government, and calculated for perpetuity; and where the property of the corporation, whether real or personal, has formed a very inconsiderable feature in the case. Of course, the effect of the judgment on the property of corporations has been but seldom a question, and is much less explained than the effect of the judgment on the franchises. There is a tedious labyrinth of cases through which we have to travel on this subject, and many of the landmarks are so dim and uncertain that we are frequently at a loss to know whether we are on safe and tenable ground. It is certain, however, that the dissolution of a corporation is effected by a seizure of its franchises, although the franchises themselves are not thereby destroyed, for they exist in the hands of the state, and may be afterwards granted to the same or other individuals, in the same manner in which they were originally granted. But the existence of the corporation is terminated. Its being is so completely lost that it can have no power over, nor connection with, anything in existence; of course, it can no longer be considered as the owner or possessor

of lands or goods, rights or credits. But it does not follow that those lands and goods, rights and credits, necessarily fall into the hands of the state; much less that they are proper objects to be included in the terms of the judgment. There are but two grounds on which it can be contended, that the corporate effects fall into the hands of the state: 1. As a forfeiture for abusing the franchises; or, 2. For the want of an owner by the dissolution of the corporation.

When we examine the first of these grounds, we find nothing in the books to support an idea, that the abuse of corporate franchises occasions a forfeiture of lands or goods, rights or credits, or in fact occasions any other forfeiture but the franchises themselves. The consequence of a breach of the implied condition on which their liberties were granted, was not that they should forfeit their property or possessions if they abused their franchises, but only that they should forfeit the franchises. That which comes out of the hands of the king is the proper subject of forfeiture; the king, by the seizure, resuming what originally flowed from his bounty. Authorities leading to this conclusion are numerous: See the cases cited in 2 Bac. 32, and in the *King v. Amery*, 2 T. R. 515. For the forfeiture is the same for non-user, when no property has been held, or rights exercised, as for misuser or abuser, after the possession of much property and the exercise of extensive rights and credits; and the judgment is the same in both cases. Consequently, the judgment could not direct a seizure of the corporate possessions, as a forfeiture for the violation of the charter.

Nor is the second ground, that the property falls to the state for the want of an owner, on the dissolution of the corporation, more tenable as a foundation on which to sustain this judgment. For the ownership of the corporation does not cease until its dissolution. And whether it is dissolved by the judgment of seizure or not, until the state has execution on that judgment, is not here very material. For if the corporation is dissolved by the judgment, the judgment must be regularly entered, and have its full effect, before the dissolution takes place; and it is not till then that the property can be said to be without an owner. The loss of the property to the corporation is a consequence of the judgment; and it is a contradiction of the first principles of reason, a complete reversal of effect and cause, to make such loss of property a part of the judgment. That which cannot exist till after the judgment, can never be the subject-matter on which the judgment is given. But the better

opinion seems to be, that the corporation is not dissolved by the judgment of seizure; but that it exists until the franchises are seized by execution on that judgment: See 2 Kyd on Cor. 409, 410, and the authority there cited. Consequently, the last shadow of a support for this judgment on this ground must vanish.

We have thus far examined the judgment which directs a seizure of the goods and chattels, rights and credits, lands and tenements of the corporation, on the assumed position that they will necessarily fall to the state on the dissolution of the corporation. We shall now inquire into the correctness of this position. In order to elucidate the subject, we shall examine it in detail; and in the first place inquire what becomes of the lands and tenements; secondly, what becomes of the goods and chattels; and, thirdly, what becomes of the rights and credits of the corporation; and we shall find that each of these three items is governed by different principles.

1. As to the lands and tenements: "When a corporation is dissolved," says Sir William Blackstone, "the lands and tenements revert to the person or his heirs who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved the grantor shall have the lands again. The grant is only during the life of the corporation, which may endure forever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life." 1 Bl. Comm. 484. This is the doctrine advanced by Lord Coke: Co. Lit. 13 b.; see, also, Kyd on Cor. 516; 2 Bac. 32; 2 Cruise, 493; and *Colchester v. Seaber*, 3 Burr. 1866. We see but little in the books that contradicts or questions those authorities, and the cases that look a different way maintain that the lands would escheat: 2 Bac. 32. If either of those principles be correct, we feel warranted in determining that the corporate lands and tenements cannot be seized into the hands of the state, and certainly not in the manner contemplated by this judgment.

2. As to the goods and chattels. On this subject the books are almost silent. In the argument of *Colchester v. Seaber*, it is said by Sir Fletcher Norton, on the authority of 1 Roll. Ab. 816, that the goods and chattels go to the crown. An English writer, who has collected together most of the cases on corporations, concludes his remarks on the effect of a dissolution in these words: "What becomes of the personal estate is, per-

haps, not decided; but probably it vests in the crown." 2 Kyd on Cor. 516. We do not feel under the necessity of resolving any doubts which may rest on this subject; for if the law were conclusive, that the goods and chattels in this case would vest in the state on the dissolution of the corporation, yet we have already seen that this would not be as a forfeiture, but because they were without an owner, and that the claim of the state could not exist until after judgment; and consequently it is impossible to include them in the terms of the judgment.

8. As to the rights and credits of the corporation. These, as applying to the debts, etc., due to the corporation, are supposed to be of considerable amount, and have formed a principal feature in every view of this case. But the importance of the case, arising from the amount in controversy, cannot affect the principles by which it is governed; and when those principles are fixed they must be declared, let the consequence to individuals or the community be what it may. That the debts are necessarily lost to the corporation, naturally follows from the principles we have examined. For when dissolved they have no existence, and can have no claim to, nor control over anything whatever. They not only die, but leave no representative behind them. This, in every respect, is the case with aggregate corporations. Sole corporations depend, in this respect, upon principles somewhat different; but with them we have now no concern. But although the debts fall out of the lifeless hands of the corporation, at the same time with their real and personal estate, yet when thus out of their hands they are very different in their natures from the real and personal estate. Land and goods have a necessary existence, although they may be without an owner in being or in expectancy. They continue in being, and may be made the subject of possession by occupancy. But this is not the case with respect to debts. They have no necessary existence, and are so conclusively personal that they cannot exist without an obligor and obligee in being or in expectancy. And on the death of the obligor or obligee, without the possibility of a representative, the obligation ceases. Such appears to be the case on the dissolution of a corporation aggregate. Blackstone says "the debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them in their natural capacities:" 1 Bl. Com. 484; 2 Kyd on Cor. 516, uses the same language: 2 Bac. 32, advances nearly the same doctrine on the authority of Lev. 237; Owen, 73; and 2 And. 107. And

this doctrine is either directly or indirectly supported in a variety of cases. See the before-mentioned case of *Colchester v. Seaber*; also *Rex v. Pasmore*, 3 T. R. 199; *The Mayor etc. of Scarborough v. Buller*, 2 Lev. 237; 4 Com. Dig. 273.

If this doctrine be correct, and we find it uncontradicted, the seizure of the rights and credits of the corporation is impossible in the nature of things, because their existence ceases as the claim of the state commences. But even if they could be seized into the hands of the state they would be unavailing. The debts due to the corporation could not on any common law principle be collected by the state or its agent; there being no privity of contract, either in fact or law, between the state and the debtor to the corporation. It is true that when the powers of the corporation have lain dormant for many years, and have afterwards been revived by a new charter, they have been considered capable of collecting debts formerly due to them. This was the case in *Colchester v. Seaber*. And even when the name of the corporation has been changed by letters patent, they have collected debts due to them by their former name. This was done in *The Mayor etc. of Scarborough v. Buller*. But these cases were decided on the principle that the corporation that sued was virtually and substantially the same body that made the contract, and to whom the obligation was properly due. But such is not the case with the state. It has no connection with the obligor or the obligation, and cannot recover the debt by suit.

Nor does the act of assembly, authorizing the collection of the corporation debts by commissioners to be appointed for that purpose, make any alteration in the case. This act was not intended to make a new law to regulate those debts, or to alter the principles that governed the corporation contracts; but seems founded on the supposition that the debts would become due to the state by the seizure of the corporate franchises, and therefore makes provision for having them collected by commissioners. There is nothing in the act calculated to give those debts a continued existence after the dissolution of the corporation. The act only presumes they would by law have such an existence, and therefore makes a disposition of them. The debts must therefore be considered, on common law principles, unaffected by the act, and therefore subject to extinguishment by a dissolution of the corporation. Thus, in no view of the case, can that part of the judgment which directs a seizure into the hands of the state, of the goods and chattels, rights, credits

and effects, lands, tenements and hereditaments of the corporation, be supported.

BLACKFORD, J., was absent.

By COURT. That part of the judgment which awards that the privileges, liberties, and franchises of the defendants below be seised into the custody of the state, is affirmed; and that part which awards that their goods and chattels, rights, credits and effects, lands, tenements and hereditaments, be seised into the custody of the state, is reversed. To be certified, etc.

DISSOLUTION OF CORPORATION.—The effect, at common law, of the dissolution or civil death of a corporation is very fully and correctly stated in the foregoing cases. Its real estate reverted to the grantor and his heirs: Angell & Ames on Corp. sec. 779; Field on Corporations, secs. 491, 492. The personal estate vested, in England, in the king, and in America, in the people. The debts due to and from the corporation were totally extinguished: A. & A. on Corp. sec. 779; Field on Corp. secs. 491, 492. The rules of the common law upon this subject are now usually treated as obsolete, at least in the case of private corporations formed for the purpose of acquiring and managing private property. In place of the harsh rules of the common law, other rules have been adopted which recognize and protect the equitable rights of the stockholders and creditors. The case of *Bacon v. Robertson*, 18 How. U. S. 480, is a leading one on this subject. A judgment of forfeiture was rendered against the commercial bank of Natchez, and the property, books, and assets of the bank were adjudged to be seized and delivered to a trustee. The trustee took possession of property of the corporation, having a nominal value of four millions of dollars. Subsequently a bill was filed in the circuit court of the United States against the trustee and others, on behalf of the stockholders to establish their title to the surplus, and to procure its distribution among the plaintiffs and such other stockholders as should be willing to join in the prosecution of the suit. Mr. Justice Campbell delivered the opinion of the supreme court of the United States, in the course of which he said: "The common law of Great Britain was deficient in supplying the instrumentalities for a speedy and just settlement of the affairs of an insolvent corporation whose charter had been forfeited by a judicial sentence. The opinion usually expressed as to the effect of such a sentence was unsatisfactory and questioned. There had been instances in Great Britain of the dissolution of public or ecclesiastical corporations by the exertion of the public authority, or as a consequence of the death of their members, and parliament and the courts had affirmed in these instances that the indorsements they had received from the prince or pious founders would revert in such a case: Stat. de Terris Templariorum, 17 Edw. II.; Dean and Canons of Windsor, Godb. 211; *Johnson v. Norway*, Winch. 37; Owen, 73, 3 Vin. Abr. 280. What was to become of their personal estate and of their debts and credits had not been settled in any adjudged case, and as was said by Pollexfen in the argument of the *quo warranto* against the city of London, was perhaps *non definitur in jure*. Solicitor Finch, who argued for the crown in that cause, admitted, 'I do not find any judgment in a *quo warranto* of a corporation being forfeited.' Treby, on behalf of the city, said, 'The dissolving a corporation by a judgment in law, as is here sought,

I believe, is a thing that never came within the compass of any man's imagination till now; no, not so much as in the putting of a case. For in all my search (and upon this occasion I have bestowed a great deal of time in searching), I cannot find that it ever so much as entered into the conception of any man before; and I am the more confirmed in it, because so learned a gentleman as Mr. Solicitor has not cited any one such case wherein it has been (I do not say adjudged), but even so much as questioned or attempted; and, therefore, I may very boldly call this a case *primæ impressionis*.' The argument of Pollexfen was equally positive. The power of courts to adjudge a forfeiture so as to dissolve a corporation was affirmed in that case, but the effect of that judgment was not illustrated by any execution, and the courts were relieved from their embarrassment by an act of parliament annulling it: *Smith's case*, 4 Mod. 53; Skin. 310; 8 St. Tri. 1042, 1057, 1263. Nor have the discussions since the revolution extended our knowledge upon this intricate subject.

"The case of *Rex v. The Amery*, 2 T. R. 515, has exerted much influence upon text writers. The questions were whether a judgment of seizure *quousque* upon a default was final, and if so, whether the king's grant of pardon and restitution would overreach and defeat a charter granting to a new body of men the same liberties, intermediate the seizure and the pardon. The king's bench relying upon the year-book of 15 Edw. IV., declared the judgment to be final and the new charter irrevocable. But the house of lords reversed the judgment. The judges, upon an examination of the original roll of the case in the year-book, discovered that it did not support the conclusion drawn from it, and Chief Baron Eyre says "that Lord Coke had adopted the doctrine too hastily." The discussions upon this case show how much the knowledge of the writ of *quo warranto*, as it had been used and applied under the Plantagenets and Tudors, had gone from the memories of courts and lawyers: 4 T. R. 122; *Tau. on Quo Warranto*, 24. In *Colchester v. Seaber*, 3 Bur. 1866, where the suit was upon a bond, and the defence was that certain facts had occurred to dissolve the corporation, and that the creditor's claim was extinguished on the bond, Lord Mansfield said: 'Without an express authority, so strong as not to be gotten over, we ought not to determine a case so much against reason as that parliament should be obliged to interfere.' The question occurs here, could parliament interfere? And the answer would be by their authorizing a suit to be brought, notwithstanding the dissolution. These are all cases of municipal corporations, where the corporations had no rights in the property of the corporation in severalty.

"The courts of Westminster have found much difficulty in applying the principles settled in regard to such to the commercial and trading corporations that have come into existence during this century. The courts there, within the last twelve months, have been troubled to discuss whether a commercial corporation could recover damages for the breach of a parol contract, or whether the contract should have a seal to make it valid: *Austra. R. M. N. Co. v. Marzetti*, 32 L. & E. 572; 3 Id. 420. It may be admitted that the courts of law could not give any relief to the shareholders of a corporation disfranchised by a judicial sentence in respect to a corporate right. Their modes of proceeding do not provide for the case, as they have not for many others: 1 Plow. 276, 277; *Richards v. Richards*, 2 B. & Adol. 447; Will. Ex. 1129. But this concession does not involve an acknowledgment that the rights of the corporations are extinguished. Courts of chancery have been forced into a closer contact with these associations, and have formed a more rational conception of their constitution, and a more accurate estimate

of their importance to the industrial relations of society. Those courts have evinced a spirit of accommodation of their modes of proceeding so as to adapt them to the changing exigencies of society. Lord Cottenham, in *Walkworth v. Holl*, 4 M. & C. 635, in reference to the conduct of suits in which similar associations were concerned, said: 'I think it is the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to rules and forms established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy.' In the same spirit, Sir James Wigram, V. C., observes: 'Corporations of this kind are in truth little more than private partnerships; and in cases which may be easily suggested, it would be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights *inter se*, because, in order to make their common objects more attainable, the crown or legislature have conferred upon them the benefit of a corporate character.' *Foss v. Harbottle*, 2 Hare, 491. These just views which have afforded to wise chancellors a sufficient motive to enlarge the scope and relax the rigor of the rules of chancery proceeding, so as to bring the civil rights of individuals in whatever form they may exist, or however complicated or ramified, under the protection of legitimate judicial administration, have been adopted in the United States, not simply for the improvement of methods of proceeding, but also for the adjustment of rights and the assertion of responsibilities among the members of such associations.

"In the *Bank of the United States v. Deveaux*, 5 Cr. 61, this court held that the technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially, and the court in that case allowed the corporation to use its corporate name for the purposes of suit in the courts of the United States to represent the civil capacities of the persons who composed it. So the court has held that corporate acts need not be evinced by writing, nor corporate contracts by a common seal; that corporations are liable on contracts made or defaults or torts committed by their officers or agents in the course of their employment: 12 Wheat. 40; *Id.* 64; 6 How. 344; 14 *Id.* 468. In *Lennox v. Roberts*, 2 Wheat. 373, the court gave effect to a general assignment of a corporation of its *choses in action* made in anticipation of the expiration of its charter, and which was designed to preserve to the corporators their rights of property. In the *Mumma v. Potomac Company*, 8 Pet. 281, it held that the assignment of all the property of a corporation and the surrender and cancellation of its charter with the consent of the legislature, did not defeat the right of the judgment-creditor to satisfaction out of the property which had belonged to it. The power of courts of equity in cases like these was recognized as adequate to maintain the rights of the parties beneficially interested, and this doctrine was repeated and developed in *Curran v. Arkansas*, 15 How. 304.

"The tendency of the discussions and judgments of the court of chancery in Great Britain, and of the courts of this country, is to concede the existence of a distinct and positive right of property in the individuals composing the corporation, in its capital and business, which is subject in the main to the management and control of the corporation itself; but that cases may arise where the corporators may assert not only their own rights, but the rights of the corporate body. And no reason can be given why the dissolution of a corporation, whether by judicial sentence or otherwise, whose capital was

contributed by shareholders, for a lawful and perhaps laudable enterprise, with the consent of the legislature, should suspend the operation of these principles, or hinder the effective interference of the court of chancery for the preservation of individual rights of property in such a case. The withdrawal of the charter—that is, the right to use the corporate name for the purposes of suits before the ordinary tribunals—is such a substantial impediment to the prosecution of the rights of the parties interested, whether creditors or debtors, as would authorize equitable interposition in their behalf, within the doctrine of chancery precedents: *Stainton v. The Carron Company*, 23 L. & E. 315; *Travis v. Milne*, 9 Hare, 141; 2 Id. 491. For the sentence of forfeiture does not attain the rights of property of the corporators or corporation, for then the state would appropriate it. If those rights are put an end to, it would seem to be rather from a careless disregard, or hardened and reckless indifference to consequences, on the part of the public authority, than from any preconceived plan or purpose. For, according to the doctrine of the text-writers on this subject, the consequences are visited without any discrimination; the losses are imposed upon those who are not blameworthy, and the benefits are accumulated upon those who are without desert.

“The effect of a dissolution of a corporation is usually described to be the reversion of the lands to those who had granted them; the extinguishment of the debts, either to or from the corporate body, so that they are not a charge nor a benefit to the members. The instances which support the *dictum* in reference to the lands, consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, and whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all their members; or of donations to public bodies, such as a mayor and commonalty. But such cases afford no analogy to that before us. The acquisitions of real property by a trading corporation are commonly made upon a bargain and sale for a full consideration, and without conditions in the deed; and no conditions are implied in laws in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object; nor any reversion, where the succession fails. If the statement of the consequences of a dissolution upon the debts and credits of the corporation is literally taken, there can be no objection to it. The members cannot recover nor be charged with them, in their natural capacities, in a court of law. But this does not solve the difficulty. The question is, has the *bona fide* and just creditor of a corporation dissolved under a judicial sentence for a breach in its charter, any claim upon the corporate property for the satisfaction of his debt, apart from the reservation in the act of the legislature which directed the prosecution? Can the lands be resumed in disregard of their rights by vendors, who have received a full payment of their price, and executed an absolute conveyance? Can the careless, improvident or faithless debtor, plead the extinction of his debt, or of the creditor's claim, and thus receive protection in his delinquency? The creditor is blameless—he has not participated in the corporate mismanagement, nor procured the judicial sentence; he has trusted upon visible property acquired by the corporation, in virtue of its legislative sanction. How can the vendors of the land or the delinquent debtors resist the might of his equity?

“But if the claims of the creditor are irresistible, those of the stockholder are not inferior, at least against the parties who claim to hold the corporate

property. The money, evidences of debt, lands, and personalty acquired by the corporation, were purchased with the capital they lawfully contributed to a legitimate enterprise, conducted under the legislative authority. The enterprise has failed under circumstances, it may well be, which entitle the state to withdraw its special support and encouragement; but the state does not affirm that any cause for the confiscation of the property, or for the infliction of a heavier penalty, has arisen. It is a case, therefore, in which courts of chancery, upon their well settled principles, would aid the parties to realize the property belonging to the corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it:" *Bacon v. Robertson*, 20 How. U. S. 483.

No doubt many American cases can be found which, in general terms, re-affirm the common law rules as laid down in the case of *The State Bank v. The State*; *Malloy v. Mallett*, 6 Jones Eq. 345; *Fox v. Horah*, 1 Ired. Eq. 358; *Commercial Bank v. Lockwood*, 2 Harr. Del. 9; *Port Gibson v. Moore*, 13 S. & M. 157. Nevertheless the modern authorities establish the rule that the jurisdiction of equity may be successfully invoked to take charge of the assets of a dissolved corporation and to apply those assets to the satisfaction of its creditors, and thereafter to distribute the surplus, if any, among the stockholders, ratably according to the number of shares held by each: *Field on Corporations*, secs. 491, 292; *Muscatine T. V. v. Frink*, 18 Ia. 469; *Lum v. Robertson*, 6 Wall. 277; *New Albany v. Burke*, 11 Wall. 96; *Dillon on Mun. Corp.*, sec. 113; *Angell & Ames on Corp.*, sec. 779 a; *Hastings v. Drew*, 50 How. P. 254; *City Ins. Co. v. Com. Bank*, 68 Ill. 348; *Curran v. State of Arkansas*, 15 How. U. S. 312; *Tinkham v. Borst*, 31 Barb. 407.

DEPUTY v. TOBIAS.

[1 BLACKFORD, 311.]

BILL FOR NEW TRIAL.—Where the defendant in an action of assumpsit, against whom a verdict and judgment had been obtained, filed a bill in equity for a new trial, on the ground of newly discovered evidence, and averred that due diligence had been used without effect to procure the evidence at the trial, it was held, on demurrer, that the bill would lie.

ERROR to the circuit court. The opinion states the case.

Stevens, for the plaintiff.

Moore, contra.

HOLMAN, J. Deputy filed his bill in chancery in the Jefferson circuit court against Tobias for the purpose of obtaining a new trial in an action of assumpsit, in which Tobias had obtained a judgment against him on the common law side of said court. The bill states that Tobias, by a parol contract, undertook to perform for Deputy certain work and labor as a carpenter, at a specified price, a small part of which was to be paid in hand,

and the residue when the work was completed. That Tobias performed the principal part of the work, but not in a workmanlike manner, and refused to perform the remainder. That Deputy paid him that part of the consideration which was to be advanced, and a considerable part of that which was not due until the work was finished, under a belief that Tobias would fulfill his contract. That Tobias, after abandoning his undertaking, commenced an action against Deputy for the work and labor so performed under the special agreement, and declared in two general counts—one an *indebitatus assumpsit*, the other a *quantum meruit*; to which Deputy pleaded non-assumpsit and payment, but was unable, after using all the diligence in his power, to find any witness by whom he could prove the special contract, and consequently a verdict and judgment were obtained by Tobias for the value of the work so performed. That after the rendition of the judgment, Deputy discovered that by the evidence of two witnesses (who are named, together with their places of residence), he could legally and fully prove the special contract, and also the failure of Tobias to perform that contract. Prayer for a new trial of the issues at law. To this bill Tobias demurred, and the court sustained the demurrer and dismissed the bill.

The demurrer should have been overruled. We think the failure to defend at law is sufficiently accounted for; and if the contract was as is stated by the bill, the verdict and judgment ought not to stand. The only plausible ground of demurrer is that Deputy should have obtained, by a bill of discovery, the confession of Tobias, to be used in the trial at law. But a bill of discovery is the *dernier resort* in obtaining testimony; inasmuch as when it is resorted to, it shuts the door against every other method. Therefore, it is purely discretionary with every suitor whether he will file such a bill or not; and he can never be considered in laches for not seeking a discovery from the opposite party.

By COURT. The judgment is reversed, and the proceedings subsequent to the demurrer are set aside, with costs. Cause remanded, with directions to permit the defendant to withdraw his demurrer and answer the bill.

JOHN v. HUNT.

[1 BLACKFORD, 234.]

THE HEIRS OF THE MORTGAGOR should be made parties to a *scire facias* against the administrator to foreclose a mortgage of the intestate; if there are no heirs, such fact should appear from the record.

ERROR to the circuit court. The opinion states the case.

Caswell, for the plaintiff.

Nelson, *contra*.

HOLMAN, J. Drew, in his lifetime, mortgaged certain lands to N. and A. Hunt, for securing the payment of a certain sum of money. After the decease of Drew, the money remaining unpaid, the Hunts sued out a *scire facias* against John, administrator of Drew, to foreclose the mortgage; on which the plaintiffs obtained a judgment by default. The only question arising out of the case is, whether the heirs of Drew should not have been made parties in the *scire facias*. It is not to be presumed that a man dies without heirs. If such is the fact, it must be shown. The equity of redemption belongs of right to the heir of the mortgagor; and he should be a party in any proceedings to foreclose the mortgage. Such is the British practice, and we see nothing in our acts of assembly which requires this practice to be changed.

By COURT. The judgment is reversed with costs.

WHEELER v. ROBB.

[1 BLACKFORD, 330.]

IN SLANDER, ALL THE WORDS LAID need not be proved, but so much of them must be proved as is sufficient to sustain the cause of action; evidence of equivalent words will not suffice.

THE SUBSTANCE OF THE WORDS, or the words themselves as laid, must be proved to sustain the plaintiff's action upon the general issue.

ERROR to the circuit. Robb brought an action of slander against Wheeler. Pleas, the general issue, and a special plea of justification. Verdict and judgment for the plaintiff below.

BLACKFORD, J. After the testimony was closed, the following instruction to the jury was asked of the court, on the part of the defendant, "that the words laid in the declaration must be

proved, and that equivalent expressions will not suffice;" which instruction the court refused to give. In *Mailland v. Goldney*, 2 East, 426, Mr. Justice Lawrence, in speaking of the action of slander, observes: "I take the rule in actions of this sort to be, that though the plaintiff need not prove all the words laid, yet he must prove so much of them as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words of slander." This we believe to be the law, and therefore the court erred in refusing the instruction required.

The court was further called upon by the defendant to instruct the jury, "that, notwithstanding the plea of justification, the slanderous words charged, or at least a part of them, must be proved to entitle the plaintiff to recover." This instruction was also refused. The statute authorizes the defendant to plead as many pleas as he thinks proper, and they must be considered independent of each other. The different issues in this case are entirely unconnected, and the admission contained in the plea of justification cannot, in any way, affect the plea of not guilty. Notwithstanding the special plea, the plaintiff in the court below was bound, upon the general issue, to prove his cause of action. This might have been done, not by the proof of equivalent expressions, but by proof of the words themselves as laid, or the substance of them: 1 Phill. Ev. 155; 2 Id. 97. The court, therefore, committed an error in the refusal of this instruction.

By COURT. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, etc.

VARIANCE IN SLANDER.—Judge Scott, delivering the opinion of the court in *Berry v. Dryden*, 7 Mo. 334, gives the following explanation of the rules of law bearing on questions of variance in slander: "The rule is stated in the books that the slander proved must substantially correspond with that charged in the declaration. By this it is not to be understood that if certain words are employed to convey a slanderous imputation, these words will support a declaration containing the same imputation in different words. The meaning of the rule seems to be that if the words charged to have been spoken are proved, but with the omission or addition of others not all varying or affecting their sense, the variance will not be regarded. Although the words proved are equivalent to the words charged in the declaration, yet not being the same in substance an action cannot be maintained, and although the same idea is conveyed in the words charged and those proved, yet if they are not substantially the same words, though they contain the same charge but in different phraseology, the plaintiff is not entitled to recover." That is, at least some of the words as laid must be proved; and if all the words as laid constitute but one charge and are material to that charge, they must all be proved: *Birch v. Benton*, 36 Mo. 153. As is said in this case:

"The words that contain the poison to the character and impute the crime must be proved as laid." In *Bundy v. Hart*, 46 Mo. 460, 466, this rule was re-affirmed in this language: "The words proved must be substantially the same words charged in the petition, not different words of the same import." The Missouri doctrine appears to conform to that of the principal case. What was decided by this case is stated by Osborn, J., in *Tucker v. Call*, 45 Ind. 31, 35, as follows: "Taking the case of *Wheeler v. Robb* as the leading one in this state, and recognizing the rule there laid down as the true rule, it is material to ascertain what it is. We understand it to be that it is not sufficient to prove the speaking of words different from those laid in the complaint, but having the same sense or meaning; the words themselves, or enough of them to substantially make out the charge included in the set of words must be proven, and so we understand the charge in the case at bar. * * The court in *Wheeler v. Robb*, recognized the distinction between proof of equivalent words and the substance of the words alleged in the declaration. Under the charge, the jury, we think would understand that it was necessary for the plaintiff to prove that the defendant spoke enough of the words as alleged in the complaint to make out a charge of larceny against the plaintiff without proving the speaking of all of them." The charge here referred to was: "that if the jury found from the evidence that the defendant spoke of and concerning the plaintiff, and of and concerning his character, substantially, any one or more of the sets of words as alleged in the complaint, imputing and charging the crime of larceny against the plaintiff, it was sufficient to sustain the issue as to the speaking of that set of words, and on that issue they should find for the plaintiff." The rule that words equivalent in meaning will not support the declaration, but that the words as laid, which are necessary to constitute the slander must be proved, is adopted also in *Sanford v. Gaddis*, 15 Ill. 228; *Norton v. Gordon*, 16 Id. 38; *Williams v. Odell*, 29 Id. 156; and *Baker v. Young*, 44 Id. 42; *Olsted v. Miller*, 1 Wend. 506; *Smith v. Miles*, 15 Vt. 245; *Smith v. Hollister*, 32 Id. 695; *Taylor v. Moran*, 1 Met. (Ken.) 114; *Hancock v. Stephens*, 11 Hum. 507; *Horton v. Reavis*, 2 Murphy, 280.

In other states, however, a different doctrine prevails. It is well stated in *Williams v. Miner*, 18 Conn. 464, 474, by Chief Justice Church: "The law does not require literal proof of the words as given in the declaration, but only proof of words of the same sense and import. The witness will not be permitted to give merely his construction of the language used, or the impression which the conversation made upon his mind, without giving the conversation itself. He must state the language used in its connection with the subject of the conversation, as near as he can recollect it, and if this does not differ in its essential meaning from the words alleged in the declaration, though it may in the forms of expression, it will sufficiently support the averment. There is nothing more difficult than for a witness to recollect the exact language used by another, and to require this would be to defeat recoveries in actions for verbal slander in almost every instance." The same principle governs in Massachusetts: *Baldwin v. Soule*, 6 Gray, 321; *Payson v. Macomber*, 3 Allen, 69; *Robbins v. Fletcher*, 101 Mass. 115; *Chace v. Sherman*, 119 Id. 387; and in the states represented by the following decisions: *Stevens v. Handley*, Wright (O.) 123; *Wilson v. Runyon*, Id. 651, 654; *Bassett v. Spofford*, 11 N. H. 127; *McClintock v. Crick*, 4 Iowa, 453; *Desmond v. Brown*, 29 Id. 53; *Hume v. Arrasmith*, 1 Bibb, 165; S. C., 4 Am. Dec. 626; *Hersh v. Ringwalt*, 3 Yeates, 508; S. C., 2 Am. Dec. 392. The adoption of the provision in the New York code that no variance be-

tween the allegation in a pleading and the proof, shall be deemed material unless it has actually misled the adverse party to his prejudice, will, it is conceived, work some change in the strict rule held by some of the courts as to the proof of the words as laid: *Pegram v. Stoltz*, 67 N. C. 144; *Townshend on Libel and Slander*.

ADMISSIBILITY OF SPECIAL PLEA TO PROVE SPEAKING.—The doctrine here laid down that where a special plea in justification is pleaded with the general issue, the plaintiff cannot under the latter plea use the former to prove the speaking of the words, is in accordance with the weight of authority, but is opposed to the rule adopted in *Alderman v. French*, 11 Am. Dec. 114. The decisions on this point are reviewed in the note to that case, 11 Am. Dec. 129.

HELM v. VAN VLEET.

[1 BLACKFORD, 342.]

IF AN ADMINISTRATOR CHANGE THE NATURE OF THE DEBT originally due to the intestate, by a contract made with himself, he must sue for the new debt in his own name and not in his representative capacity.

STYLING HIMSELF AS ADMINISTRATOR in the declaration will be considered as *descriptio personæ* merely where the plaintiff has declared on a promise made to himself and has taken judgment in his own name.

A JUDGMENT AGAINST ONE of two defendants, after service of the writ on both, cannot be sustained on any principle of common law or statute.

ERROR to the circuit court in an action of debt. It appeared from the sheriff's return that the *capias* had been served on one of the defendants on the fourth of March, 1825, and on the other on the seventh of the same month. The defendant, on whom the writ had been served ten days before the return day, failing to appear, the plaintiff took judgment by default against him alone for the amount mentioned in the declaration. Other grounds of objection to the judgment appear from the opinion.

Smith, for the plaintiff.

Wick, *contra*.

SCOTT, J. This judgment is complained of on two grounds: first, because the plaintiff in his declaration styles himself administrator, and sets out a contract made with himself; and secondly, because the *capias* was served on both defendants, and the judgment is against one only, no notice being taken of the other. The first point presents but little difficulty. If an administrator change the nature of a debt, originally due to the intestate, by a contract made with himself, he must sue for the new debt in his own name, and not in his representative character: 3 Bos. & P. 10; 1 T. R. 489; 7 Id. 354. In this case the

plaintiff declares on a promise made to himself, and the judgment is in his own name. His styling himself administrator may be considered as only a *descriptio personæ*, and does not change the nature or effect of the action, or of the judgment.

The second is a fatal objection. A judgment against one of two defendants, after service of the writ on both, cannot be sustained on any principle either of common law or of statute. In case of a joint or several obligation, the obligee may proceed against the obligors, jointly or severally, at his election; but if he once elect to sue them jointly, he cannot, after a service of process on both, take judgment against one only. Our statute provides, instead of the English process of outlawry, that where one of several defendants named is served with the writ, and the sheriff as to the others returns *non est inventus*, the plaintiff may take judgment against him on whom the writ was served. This is a statutory proceeding, and is authorized only in cases where the sheriff's return shows that the other defendant named in the writ was not found. There is no such return in the case before us. The return here shows that both were found, and that the writ was served on both. The judgment is therefore erroneous, and must be reversed: *Vide* 7 Cranch, 194; 1 Wash. 379; 4 East, 589; 1 Saund. 291, n. 4; 5 Bac. 165.

By COURT. The judgment is reversed, and the proceedings subsequent to the return of the writ are set aside, with costs. Cause remanded, etc.

KITCHELL v. VANADAR.

[1 BLACKFORD, 356.]

- ▲ DEPOSIT BY A COMMON CARRIER of part of the goods entrusted to him, as security for the purchase of a boat to enable him to reach his destination, is unauthorized; and the right to the possession of the goods remains in the original owner.
- ▲ BONA FIDE PURCHASER of goods from a bailee, not at market overt, cannot hold them against the owner.

ERROR to the circuit court. The opinion states the case.

Battell, for the plaintiff.

Hall, contra.

SCOTT, J. J. M. Porter, E. Porter, and others, who were carriers, purchased of Vanadar a boat; and told him at the time of making the contract that they were carriers, and pur-

chased the boat for the purpose of ascending Green river with a cargo of salt, to the place of destination; and they deposited with Vanadar twenty barrels of salt, as a security for the price of the boat. Shrewsberry and Crocket, who were the owners of the cargo, sent Kitchell as their agent, to take charge of the salt, and dispose of it. Kitchell took the twenty barrels which were left with Vanadar, for which Vanadar brought an action of trover in the Vandenburg circuit court, and had judgment. On the trial of the cause, the court instructed the jury that, although it was proved that Shrewsberry and Crocket were the owners of the salt, that Kitchell was their lawfully authorized agent, and that the carriers had no right or instructions to sell it, still the sale to Vanadar was good, and the agent of Shrewsberry and Crocket had no right to take it. The defendant's counsel conceiving that the court had misdirected the jury, moved for a new trial, which was refused. Exceptions were taken to the opinion of the court, and the bill of exceptions was sealed and made a part of the record. We are now called on to decide upon the propriety of these instructions.

It is a general rule of law, sanctioned by sound reason and the common understanding of mankind, that no one can, by his sale, transfer to another the right of property in a thing of which he is not himself the owner. To this rule, however, the laws of England contain some exceptions. For the security of purchasers in their contracts, and for the encouragement of commercial intercourse, the law is that all sales of things vendible in market overt shall not only be good between the parties, but shall also be binding on all others who have any right or property therein: 2 Bl. Com. 449. On the same principle it has been held that if a bailee of goods give or sell them to a stranger, the bailor cannot maintain an action against the vendee for the specific articles, for by the sale and delivery by a person who has a special property in, and possession of, the goods, the general property of the bailor is divested. This is stated as the law in 2 Saund. 47, b, n. 1; 6 Bac. 684; *Strange*, 505; and *Sir T. Jones*, 114, are also cited. *Brooke's Abridgment* seems to be the leading authority on this point, to which the latter cases all refer: Bro. 216, 295. But in the more modern decisions, the doctrine in *Brooke* is denied to be law, and the current of authorities now seems to be that no unauthorized act of a bailee can divest the bailor of his general property: See 1 Wils. 8; *Wheelwright v. Depeyster*, 1 Johns. 471 [3 Am. Dec. 345]; *Hard*. 531.

But had the doctrine of Brooke, and the subsequent decisions founded upon it, never been disputed, it would not apply to the present case. The law as there laid down is, that if the bailee or other person who has only a special property, sell and deliver the goods to another as his own, *bona fide* and without notice, the general owner cannot maintain an action against the vendee. Here it is in evidence, that the persons of whom Vanadar received the salt told him, at the time of making the contract, that they were carriers, and thereby gave him an ample opportunity to guard his interest by inquiring into the extent of their authority, or demanding a different security. We think the instructions given to the jury by the circuit court were incorrect, and the judgment must therefore be reversed.

By COURT. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, etc.

See *Bay v. Coddington*, 9 Am. Dec. 270, as to the rights of an indorsee of a negotiable note from the agent of the owner.

FISCHLI v. FISCHLI.

[1 BLACKFORD, 380.]

CONCLUSIVENESS OF JUDGMENT OF SISTER STATE.—A judgment or decree obtained in another state is conclusive here as to all matters which were or might have been there adjudicated. Hence, a decree of divorce in Kentucky, in which alimony was allowed, concludes the wife from applying in this state for a further provision, although such original allowance was insufficient.

IN ALLOWING ALIMONY a court may grant a gross sum or an annuity, based upon the value of the husband's property situated without as well as within the state, and such allowance will be a binding personal demand against him everywhere, or it may give the wife a sufficient part of the husband's property within the state.

AN INDEPENDENT SUIT FOR ALIMONY cannot be maintained unless authorized by statute, but a court may grant alimony incidentally in decreeing a divorce, and if the allowance is insufficient, no other court can supply the deficiency.

ERROR to the circuit court. The opinion states the case.

Dewey, for the plaintiff.

Nelson, for the defendant.

HOLMAN, J. D. Fischli filed her bill in chancery in the Clark circuit court, showing that in the year 1817, she intermarried

with J. Fischli; to whom she performed the duties of an obedient, affectionate wife; but that he deserted her a few days after the marriage, with the intention of abandonment for more than two years. That he neglected and refused to provide for her support, treated her with severity, and unjustly aspersed her character. That she applied to the Jefferson circuit court, in the state of Kentucky; and by the decree of the said court obtained a divorce from her said husband, and a decree against him for the sum of three thousand eight hundred dollars, and one third of the real estate he possessed in the state of Kentucky during her life; but that the avails of said decree, after paying the expenses of litigation, are insufficient for her comfortable support. She further states in her bill that he is possessed of valuable lands and tenements in Clark county in this state, and prays for a decree of one third part thereof during her life, and for general relief. To this bill the defendant demurred, his demurrer was sustained and the bill dismissed.

This divorce having been granted in Kentucky, and a part of the husband's property decreed to the wife, it is important for us to know how far the rights of the parties, with regard to the provision made for the wife, were adjudicated and determined by the proceedings which were had in that state. For whenever a matter is adjudicated, and finally determined by a competent tribunal it is considered forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case: See 5 Bac. 489, and the authorities there cited. Guided by this principle, we should naturally suppose that the decree of the circuit court in Kentucky had done all that equity and justice required between the parties, if there is nothing in the record of their proceedings to evince the contrary, nor anything in the case to limit their authority; and that the rights of the parties, being thus determined, were subject to no further litigation. The separate maintenance that should be decreed to the wife out of the husband's property, according to her condition in life, the fortune she brought, and her husband's circumstances, was the subject-matter of adjudication before the court that granted the divorce; and if that tribunal had the power to do ample justice between the parties, but has failed to do it, no other tribunal can take cognizance of the subject, and supply the deficiency.

The matter must rest, agreeably to the foregoing principles, where that court has left it.

In England, the power of granting divorces was confined exclusively to ecclesiastical courts. And incident to this power, in cases of divorce *a mensa et thoro*, they had the power of decreeing alimony. And, although there are some cases where the chancellor has decreed alimony, yet we believe there is no case where such a decree was made on account of the insufficiency of the provision made for the wife by the ecclesiastical court. There are but few cases where the chancellor has exercised jurisdiction in decreeing a separate maintenance to the wife after such a divorce; and each of those cases turned on some principle, different from that of providing an adequate maintenance for the wife where the ecclesiastical court had granted the divorce, but had failed to make any provision for the wife, or had made one that was insufficient. The greater number of cases, where the chancellor has interfered in behalf of the wife, have been where there was an express agreement between the parties, or a fund in trust for the future benefit of the wife, as in the case of *Oxendon v. Oxendon*, 2 Vern. 493; or where the property has been devised or had descended to the wife after the divorce, as in *Nicholls v. Danvers*, 2 Vern. 671. If divorces had indeed taken place in these two cases in Vernon, as is supposed by Fonblanque in his treatise on equity, vol. 1, p. 96, they go as far, if not farther, than any subsequent case in favor of the wife. We therefore feel assured there is no case where a further maintenance has been decreed to the wife, because the first was insufficient.

The record of the proceedings in Kentucky are before us, being made a part of the bill; from which it appears that there was an appeal from the first decree of the circuit court, and that the case was finally determined by the court of appeals, under whose direction the final decree in the circuit court was made. And it is urged, from the decision of the court of appeals, that the decree for the wife's maintenance was predicated on, and limited to the property which the husband owned in Kentucky; for that court expressly decided that the division of the real estate should be confined to the defendant's lands in that state. From which the complainant would have us to understand, that the court determined that the defendant's property without the limits of that state, being beyond their direct control, must of necessity be excluded from their consideration in the division they have directed; and that that

court did not consider the rights of the parties as settled, or that they considered them settled on premises where complete equity could not be done for want of authority co-extensive with the defendant's property.

This view of their decision receives some support from the construction they have given to their act of assembly on this subject. That act is the same in this respect with ours, that the court pronouncing the decree of divorce, shall regulate and order the division of the estate, real and personal, in such a way as to them shall seem just and right, having due regard to each party and the children, if any. The opinion of that court was, that the division of the property should be made in specie, and not by the decree of a gross sum to be paid by the husband to the wife. This construction, we have no doubt, as a general rule is correct, and most conducive to the interest of both parties. But there are cases where the property may be of great value, and yet be incapable of a division in specie without a serious loss, if not a destruction of the property. Such would be the case in many manufacturing establishments, and in almost all incorporeal hereditaments. In such cases the court, in order to do justice according to the true spirit of the act of assembly, could not divide the property more equitably than by allowing a gross sum or an annuity. We recognized this construction of the act in the case of *McKinney v. McKinney*, Nov. term, 1818; and we see no reason to doubt its correctness. And if there is any case where such a construction of the act ought to be given, and such a division of the property ought to be made, the present is one of that description. Under this construction, and acting upon this principle, that court, taking a full view of the husband's property, no matter where it might be situated, nor to what jurisdiction it might be subject, might have decreed to the wife a sufficient maintenance, either in a gross sum or in annual payments; which decree would have given the wife an incontrovertible demand against the husband, wherever he or his property might be found.

But it is by no means conclusive, that that court could not have done justice to the parties, in the division of the property, without giving the act this construction. It is true, that a court of chancery, in Kentucky, cannot control the lands of the defendant in this state; consequently, the division of the real estate could not have been so ordered as to give the complainant any portion here; yet if a sufficient part of the husband's property lay in Kentucky, to constitute an adequate provision

for the wife, the court, with a view to the division of all the property, might have given a proper proportion to the wife, and allotted her that portion in Kentucky. This, we conceive to be within their jurisdiction, even on the construction they have given to the act of assembly.

Taking this view of the case, there is nothing in the opinion of the court that altogether excludes the idea that they have given the wife all that they could have given her, if all the property the defendant owns in this state had been in Kentucky. True it is, the majority of the court of appeals decided, that the division of the real estate was to be confined to the state of Kentucky; from which Judge Mills dissented, being of opinion that the real estate in Indiana should be taken into the estimate. This decision of the majority, and dissent of Judge Mills, might have been the same, if all the real estate had been in Kentucky. The majority might have concluded, that one third of the quantity of lands the defendant actually held in Kentucky, together with the gross sum of three thousand eight hundred dollars, was an adequate maintenance, and Judge Mills might have been disposed to make a further allowance, amounting to one third of the lands the defendant held in this state. This may be considered as a forced construction of the decision of the court of appeals, but it is certain that full evidence of all the defendant's possessions, both in Kentucky and Indiana, was before that court, and we conceive they had competent authority, and, as the superintendent of the circuit court, was the only proper tribunal to make a fair division of the property, and one that would be conclusive between the parties.

We are, therefore, bound to conclude, without unequivocal evidence to the contrary, that that court took the whole estimate of the defendant's property, real and personal, both in Kentucky and Indiana, and finally determined that the gross sum of three thousand eight hundred dollars, with one third of the defendant's lands in Kentucky, was all to which the defendant was, in equity, entitled. This view of the case is strengthened by the supposition, that that court must have presumed that no other tribunal under ordinary circumstances, could take any further cognizance of the subject, and that their decision was final and conclusive between the parties, as to the extent of the wife's maintenance. If we look further into this case, and consider it independently of the provision made for the wife by the decree in Kentucky, we shall find nothing in it to authorize the interference of a court of chancery. We draw

this conclusion, not from the practice in England of never allowing alimony on the dissolution of the bonds of matrimony, but from the practice in chancery where there has been a divorce *a mensa et thoro*, to which this divorce is in some respects assimilated. Divorces from the bonds of matrimony in England, are predicated on the nullity of the marriage, and all things are thereby left in the same condition in which they would have been if no such connection had been contemplated. Divorces *a mensa et thoro*, in England, and statutory divorces here, and the consequent allowance of alimony, are predicated on the relationship between husband and wife, and the obligation of the husband to provide for the suitable maintenance of the wife. Taking the matter then as it stood in England, we find no precedent, except in a few extreme cases, where any court has interfered in granting a maintenance to the wife, other than the court that granted the divorce. Most of the cases turn on the agreement of the parties, which will be carried into effect whether there has been a divorce or not: Vide, 1 Fonb. 97; 1 Maddock, 307; *Head v. Head*, 3 Atk. 547; *Seeling v. Crawley*, 2 Vern. 386.

It seems to be a general rule that the granting of a maintenance to the wife out of the husband's property is not an original but an incidental matter. Such was the conclusion of Fonblanque, after reviewing most of the cases on the subject: See 1 Fonb. 97. Such was also the determination of Lord Chancellor Thurlow, in *Ball v. Montgomery*, 2 Ves. jun., 195. His language is: "I take it to be now the established law, that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision. If she applies in this court upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that the chancellor will allow her separate maintenance; so in the ecclesiastical court, if it is necessary for a divorce *a mensa et thoro propter saevitiam*." Similar to this is the authority given by our act of assembly. The making of a provision for the wife by the division of the property, is incidental to the divorce. The court that decrees the divorce is to make the provision. And if that court fails to provide for the wife, by a division of the property, or makes an inequitable division, we know of no authority, either from the act of assembly, or the English books, for any other court to remedy the evil or extend the provision.

By COURT. The decree is affirmed, with costs.

ALIMONY.—The judgment in the above case rests upon two grounds: First, that the judgment rendered between the parties in the state of Kentucky was a conclusive adjudication of their rights; and second, that in the absence of a statute conferring jurisdiction equity will not entertain a suit brought for the sole purpose of obtaining alimony. The first ground was unquestionably tenable if the rights of the parties were in fact drawn in question and determined by the court in which the divorce was obtained. Upon the second ground great contrariety of judicial opinion has been manifested. Probably the rule asserted in *Fischli v. Fischli*, that independently of statutory authority equity has no original jurisdiction to entertain a suit for alimony, is sustained by a preponderance of the authorities in this country. Under these authorities it can be granted only as an incident to some other matter of which the court has jurisdiction: *Moore v. Moore*, 18 La. An. 613; *Adams v. Adams*, 100 Mass. 365; *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Chapman v. Chapman*, 13 Ind. 396; *Yule v. Yule*, 2 Stock. 138; *Doyle v. Doyle*, 26 Mo. 545; *McGee v. McGee*, 10 Geo. 477; *Parsons v. Parsons*, 9 N. H. 309; *Pomeroy v. Wells*, 8 Pai. 406; *Rees v. Waters*, 9 Watts, 90; *Peltier v. Peltier*, Harr. Mich. 19; *Shannon v. Shannon*, 2 Gray, 285; *Lawson v. Shotwell*, 27 Miss. 633; also the dissenting opinions of Judges Sprague and Sanderson in *Galland v. Galland*, 38 Cal. 272. Nevertheless, in several of the states, actions for alimony alone have been permitted upon the ground that such actions are within the established limits of equity jurisdiction: *Galland v. Galland*, 38 Cal. 265; *Butler v. Butler*, 4 Litt. 202; *Purcell v. Purcell*, 4 H. & M. 507; *Almond v. Almond*, 4 Rand. 662; *Logan v. Logan*, 2 B. Mon. 142; *Prather v. Prather*, 4 Des. 33; *Glover v. Glover*, 16 Ala. 446; *Rhame v. Rhame*, 1 McCord's Ch. 197; *Helmes v. Franciscus*, 2 Bland. 644; *Macnamara's case*, Id. 566.

LANG v. SCOTT.

[1 BLACKFORD, 406.]

WHERE A NEW RIGHT is introduced by statute, the statutory remedy is the one to be pursued, but where there is a pre-existing right at common law and an affirmative statute inflicts a new penalty, the law is otherwise.

ERROR to the circuit court. The opinion states the case.

Sweetser, for the plaintiff.

Wick, contra.

BLACKFORD, J. Action on the case against Lang for erecting an unauthorized ferry within two miles of the plaintiff's ferry, to his damage two thousand dollars. Demurrer to the declaration, and judgment for the plaintiff.

If a statute is introductory of new rights which did not before exist in the country, and prescribes a penalty for their violation, the persons claiming under the act must depend, for the security of the rights thus claimed, upon the provisions therein speci-

fied. When there is a pre-existing right at common law, and an affirmative statute intervenes inflicting a new penalty, the law is otherwise. The exclusive privileges of ferries were not known here until they were authorized by statute, and the statute by which they are authorized prescribes a specific penalty for their violation. Upon the provisions of the act, therefore, the owners of ferries must rely for the security of their rights, so far as courts of common law are concerned. This case cannot be distinguished in principle from *Almy v. Harris*, 5 Johns. 175.

By COURT. The judgment is reversed with costs.

STATUTORY REMEDIES.—Upon the point that where the statute makes unlawful what was before lawful, and appoints a specific remedy, that remedy must be pursued; this case is approved in *Martin v. West*, 7 Ind. 657.

LAGOW v. BADOLLET.

[1 BLACKFORD, 416.]

A BANK RESTRICTED BY ITS CHARTER to dealings in commercial paper, is not thereby prohibited from taking an assignment from a vendor of real estate of the purchaser's agreement to pay the purchase-money, where the taking of such assignment is necessary to secure a debt previously contracted.

VENDOR'S LIEN.—Where an agreement is made for the sale of real estate, the purchaser to have immediate possession, but the title to remain in the vendor till the money is paid, an express lien on the land is thereby created in favor of the vendor.

IDEM—WAIVER OF.—Such lien is not waived by a stipulation in the agreement that the purchaser is not to remove a certain steam-engine on the land until the money is paid, though this constitutes an express lien on the engine.

IDEM—ASSIGNABILITY OF.—The lien created in favor of the vendor by such an agreement is not merely personal to him, but may be assigned, and the assignment will be supported in equity to promote the ends of justice.

VENDOR AS TRUSTEE.—The vendor in such a case being a mere trustee of the legal title for the purpose of conveying to the purchaser, on payment of the purchase-money, a purchaser at an execution sale of the vendor's interest in the land, having knowledge of the agreement, takes subject to the trust, and will be compelled to execute it.

APPEAL from the circuit court. The opinion states the case.

Tabbs and Nelson, for the appellant.

Judah, for the appellees.

Scott, J. This was a suit in chancery in the Knox circuit court. The record presents the following case: An article of agreement was made on the first of September, 1821, between W. Fellows, of the one part, and W. Lagow, attorney in fact for the steam-mill company, of the other part, by which agreement Lagow sold to Fellows the ground on which the old steam-mill formerly stood, and also the steam engine, boilers, castings, etc., which had been used in the old steam-mill, for and in consideration of which Fellows covenanted and agreed to pay seven thousand dollars on or before the first of September, 1824. Fellows had immediate possession of the ground, and Lagow agreed to deliver to him the engine, boilers, castings, etc., as soon as he should have a suitable building on the said ground ready to receive them, with an express stipulation that the said engine, boilers, etc., should not be removed from the said ground until the said sum of seven thousand dollars should be paid; and on the payment of the said sum Lagow was to make to Fellows a good and sufficient title for the said lot of land. On the twenty-second of September, 1821, Lagow, for the sum of seven thousand dollars, by his writing under seal, assigned, transferred, and set over to the president, directors, and company of the bank of Vincennes, the state bank of Indiana, all the right, title and interest of the steam-mill company in and to the said agreement, and delivered the said articles of agreement to the said president, directors, and company. On the first of July, 1822, the said president, directors and company transferred the said article of agreement, by indenture, to J. Badollet, J. C. S. Harrison, and R. Buntin, the appellees in this case, in trust for the United States. Fellows erected a house, and Lagow delivered the engine, boilers, etc., according to the agreement; a steam-mill was put in operation, which remained in the possession of Fellows at the time of filing the bill.

The bill states that the bank has become insolvent and its charter forfeited, and that Fellows was, at the time of filing the bill, notoriously insolvent. In the Knox circuit court, at the March term, 1823, J. McDonald recovered judgment against the steam-mill company for the sum of one hundred and twenty-three dollars and eighty cents and costs; on which judgment execution was sued out on the twenty-fifth of November following, returnable to the March term, 1824, by virtue of which the said steam-mill lot was taken and sold, and W. Lagow became the purchaser for the sum of four hundred and fifty dollars. The bill claims a lien on the land and buildings, the

engine, boilers, castings, etc., and prays a sale of the property, and other relief, etc. The answer of Lagow admits the agreement and transfer set forth in the bill, and the judgment, execution and sale in favor of McDonald; but alleges that he purchased with his own private funds, and not as agent for the company. There was a decree for the complainants, directing a sale of the property; seven thousand dollars and the interest to be paid over to the complainants, costs to be paid to the officers, and the surplus, if any, to be paid to Lagow. Lagow appeals to this court.

It is alleged on the part of the appellant, that the agreement with Fellows was not made nor assigned in the names of the proper partners. This objection comes rather ungracefully from the appellant. He was the man who made the agreement and assigned it to the bank. He then represented himself as the authorized attorney in fact for the steam-mill company, and he now attempts to avoid his own acts, because, as he alleges, the agreement was not executed according to law. But leaving this incongruity out of the case, there is nothing in the record to support the objection. It is objected again that the bank has no power to deal in this kind of paper. The correctness of this objection depends upon the charter of the bank. By that instrument the bank is limited to paper of a certain description, in the ordinary course of business; but the restriction does not extend to any case where it might become necessary to secure the payment of a debt previously contracted, and which could not be collected in the regular way.

It is further urged by the appellant that the express lien reserved on the engine and castings was a waiver of any lien on the real estate. In support of this position, he relies on 4 Wheat. 290, 291, where it is said that an express contract that a lien shall be retained to a specified extent, is equivalent to a waiver of that lien to any greater extent; and that taking a note for the purchase-money, with approved indorsers, discharges any implied lien upon the land. It is also said that equity will not raise a lien in favor of a vendor who takes other security: Sugd. Vend. 352. The true doctrine seems to be—and these authorities amount to no more—that the vendor of real estate, whether conveyed or not, holds an equitable lien upon it for any part of the purchase-money which remains unpaid; and that lien is not repelled by taking a note or bond of the vendee, except where a distinct security is taken, either of property, or the responsibility of a third person: Sugd. Vend. 252; Mont.

Lien, 86, 90, 218; *Garson v. Green*, 1 Johns. Ch. 308. Where an express lien is reserved as to a specified part of the estate sold, as might reasonably be supposed to be the case where any considerable part of the purchase-money is paid at the time of the contract; or where the vendor has secured himself by a mortgage on other lands, or by the responsibility of other persons; the vendor evinces his intention not to depend upon the implied lien which equity would raise in his favor. In this case, however, we have nothing to do with the doctrine of implied lien. It is admitted that an agreement not to remove the engine and boilers gives an express lien on them; and it seems quite as clear that an express covenant that the title should remain in the vendor till the payment of the purchase-money creates an express lien on the real estate.

It is alleged again, that the lien, if any existed, was confined to the person of the vendor and could not be assigned. There are some *dicta* in the books, which, on a superficial view seem to favor this position, but on a careful investigation they will be found to be inapplicable to a case like the present. There seems to be no good reason why such a lien should not be assignable, where the assignment would subserve the purposes of justice. It is in principle similar to a mortgage which follows the debt into whose hands soever it may pass: *Martin v. Mowlin*, 2 Burr. 979. It was decided in the case of *Cheesebrough v. Mil-lard*, that if a creditor who has a lien on two parcels of land, elect to take his whole demand out of one parcel on which another creditor has a subsequent lien, the latter creditor is, in equity, entitled to have a prior lien assigned to him for his benefit: 1 Johns. Ch. 409 [7 Am. Dec. 494]. That decision shows, that in the opinion of a very learned and able chancellor, such a lien might be assigned so as to inure to the benefit of another person, and that equity would support such an assignment to promote the ends of justice.

In the case under consideration, Lagow, as the agent of the steam-mill company, assigned to the bank all their interest in the agreement. Their right to the seven thousand dollars, and the lien on the property to secure the payment of that sum, constituted all the beneficial interest they had to transfer. By the language of the assignment it was evidently the intention of Lagow to transfer, and of the bank to receive, all the benefits which the company could have derived from that contract. It was a fair transfer of all their right and interest for a full and valuable consideration. It was a payment of a pre-existing

debt. And it is believed there exists no rule in equity to set aside such a contract, made under such circumstances. The whole beneficial interest then being transferred to the bank there remained in the steam-mill company nothing but the bare legal title, which they held in trust for the purposes of the contract: 1 Madd. Ch. 289. When McDonald recovered judgment and sued out his execution, the company had nothing of this property but a naked trust, without any beneficial interest either in possession or in expectancy. When Lagow purchased at the execution sale, whether in his own right or as agent is wholly immaterial, he could acquire no more than the company possessed, and having full notice of the situation of the estate, he purchased it subject to all the existing incumbrances, conditions, and trusts, to which it was subject in the hands of the company, and is in equity bound to execute the trust in the same manner as he, or the company whose agent he was, would have been bound to do, had no such judgment, execution, or sale, ever taken place: Sugd. Vend. 498; 1 P. Wms. 128.

McDonald's judgment and execution could not affect the rights either of the complainants or of Fellows. The complainants had a right to the benefit of the lien to secure the payment of seven thousand dollars, and Fellows had a right, on the payment of that sum and the interest, to have a conveyance of the title. If, by reason of improvements made by Fellows, the property has acquired an increased value, so that on a sale to discharge the lien it will command a price beyond the amount of the purchase-money with interest and costs, the surplus is, in equity and good conscience, the right of Fellows and not of Lagow. This view of the case leads to the conclusion that the decree of the circuit court is correct, except so far as relates to the payment of the surplus to Lagow; in this it is erroneous and must be reversed.

The court entered a decree directing a sale of the property, appointing commissioners, etc., enjoining the persons in possession, etc., with costs to the appellees.

VENDOR'S LIEN.—In some portions of the United States the existence of the lien of a vendor who has parted with the title but has not received full payment of the purchase-money, is denied: *Kauffelt v. Bower*, 10 Am. Dec. 428; *Wright v. Dame*, 5 Met. 503; *Philbrook v. Delano*, 29 Me. 410; *Simpson v. Mundel*, 3 Kana. 185. But in the great majority of the states the lien is recognized and enforced: 2 Wash. Real Prop. 505, 508. It can not be enforced against purchasers, nor incumbrancers for value and without notice: *Duval v. Bibb*, 4 Am. Dec. 506; 2 Wash. Real Prop. 505, 508.

WAIVER OF VENDOR'S LIEN.—"This lien will be defeated if the vendor do any act manifesting an intention not to rely on the land for security. What act is to be deemed to work a waiver of a vendor's lien it may not be easy to define. But it has been held that the taking of the vendee's note or bond for the purchase-money is not such an act, nor his check which is not presented or paid, nor a renewal of the vendee's note. It can only be waived by taking collateral security, or by an express agreement to that effect. But the acceptance of a distinct and separate security for the purchase-money is a waiver, as, for instance, a mortgage of other property, or a bond or note with a surety, or indorser, or a deposit of stock. So where the vendor took notes for the purchase-money, and sold these, and the purchaser took new notes from the maker; and the taking of the notes of a third party for the purchase-money is a waiver of the lien, although it be the note of the husband where the wife is the purchaser, provided, in these cases, the presumption of a waiver is not rebutted by satisfactory evidence that it was intended that the vendor should retain his lien:" 2 Wash. Real Prop. 507.

TRANSFER OF VENDOR'S LIEN.—Generally the transfer of a debt carries with it the security which exists for its payment. This rule has, in a few of the states, been extended to the transfer of the indebtedness due to vendors for unpaid purchase-money: *Edwards v. Bohannon*, 2 Dana, 98; *Honore v. Bakewell*, 6 B. Mon. 67; *Brumfield v. Palmer*, 7 Blackf. 227; *Roper v. McCook*, 7 Ala. 318; *White v. Stover*, 10 Id. 441; *Grigsby v. Hair*, 25 Id. 327; *Fisher v. Johnson*, 5 Ind. 492. And this is the doctrine of the case now under consideration. But against this doctrine the array of authorities is very formidable: *Wellborn v. Williams*, 9 Geo. 89; *White v. Williams*, 1 Pai. 502; *Williams v. Young*, 21 Cal. 228; *Ross v. Heintzen*, 36 Id. 321; *Brush v. Kinsley*, 14 Ohio 20; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Green v. Crockett*, 2 D. & B. Eq. 390; *Webb v. Robinson*, 14 Geo. 216; *Dickenson v. Chase*, 1 Morris, 492; *Briggs v. Hill*, 6 How. (Miss.) 362; *Shall v. Biscoe*, 18 Ark. 142; *Green v. Demoss*, 10 Humph. 374. "The cases which deny that the lien passes with the personal security of the vendee do not rest, except in a few instances, upon the want of a special assignment from the vendor, but upon the ground that the lien is in its nature unassignable; and to that conclusion we have arrived. The lien is not a specific, absolute charge upon the property. It is simply a right to resort to the property upon a failure of payment by the vendee. It does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded upon the natural justice of allowing a party to reach the property, which he has transferred, to satisfy the debt which constitutes the consideration of the transfer. It is, therefore, the personal privilege of the vendor. The assignee of a note given for the purchase-money, stands in a very different position. He has not parted with the property which he seeks to reach, in consideration of the note he has received. He has never held the property, and has, therefore, no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another." "It is indispensably necessary," says Chancellor Bland, "to the existence of such a lien, that the parties should stand in the relation towards each other of *vendor* and *vendee* of real estate, the purchase-money of which has not been fully paid. If that relationship is, in any manner whatever, put off, altered, or relinquished, an equitable lien either cannot arise or will be destroyed. The pure relationship of creditor or debtor, or of borrower and lender, is incompatible with the existence of an equitable lien, excludes or extinguishes it."

And again: "An equitable lien is an incumbrance upon land which can only be held by a vendor; and although assets may be marshaled so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet no third person can, as assignee of the vendor, derive any benefit from such a lien; nor can it, like a bond or a mortgage be assigned, because it is not expressed in writing or in any separate contract, but exists only as an inseparable equitable incident of the contract of purchase, and is raised by construction of equity in favor of the vendor only. To allow it to pass by an assignment of the claim for the purchase-money, or by a transfer of the bonds or notes, given as a security for the payment of the purchase-money, would be of the most ruinous consequences to titles to real estate." 1 Bland's Chan., 523, 524. The vendor's lien, says the supreme court of Tennessee, "is nothing more than a mere equity, capable of acquiring the force and efficacy of a lien under certain circumstances, in the event of the non-payment of the purchase-money. It is the creature of a court of equity, and rests upon the principle that a person having got the estate of another shall not, as between them, keep it and not pay the consideration: *Mackreth v. Symmons*, 15 Ves. 329. But this lien is a mere personal equitable right in the vendor, and is not assignable. It looks only to the security of the vendor, and does not pass to the assignee of the vendee's obligation for the consideration-money, and, consequently, cannot be enforced in his favor:" *Green v. Demoss*, 10 Humph. 374; see also *Jackman v. Hallock*, 1 Ohio, 320; *Welborn v. Williams*, 9 Geo. 86; *Briggs v. Hill*, 6 Howe, 362; *Gilman v. Brown*, 1 Mason, 221; and the note of Hare and Wallace to *Mackreth v. Symmons*, 2 Leading Cases in Equity, 276, where all the authorities are cited.

There is a marked distinction between the lien of a vendor after absolute conveyance and the lien of a vendor where the contract of sale is unexecuted. In the latter case, the vendor holds the legal estate as security for the purchase-money. He can assign his contract with the conveyance of the title, and in such case his assignee will acquire the same rights and be subject to the same liabilities as himself: See *Sparks v. Hess*, 15 Cal. 194; and *Taylor v. McKinney*, 20 Id. 618. In the former case, the vendor retains a mere equity, which, to become of any force or effect, must be established by the decree of the court. *Baum v. Grigsby*, 21 Cal. 176.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

FROWMAN v. SMITH.

[LATTILL'S SELECT CASES, 7.]

IN AN ACTION FOR MALICIOUS PROSECUTION, the plaintiff, who has been discharged from a prosecution for felony, without a trial on the merits, cannot require proof of probable cause, until he shows express malice.

ACTION for a malicious prosecution. The opinion states the case.

By Court, MURK, C. J. The presentment against Mary Smith having been found by the grand jury, and she having been discharged therefrom, for reasons which appeared to the court, and not acquitted of the charge contained therein, by a trial thereof on the merits, the court is of opinion that, on the trial of the action for a malicious prosecution it was not incumbent on the defendants to show a probable cause, but that it was essential to the support of the plaintiff's action, that they should have proved express malice in the defendants; which not having been done, judgment reversed with costs.

TO SUPPORT AN ACTION FOR A MALICIOUS PROSECUTION it is essential that malice on the part of the defendant, the plaintiff in the prosecution complained of, and a want of probable cause for instituting such prosecution, should both concur: *Yocum v. Polly*, 1 B. Mon. 358; *Mitchell v. Mattingly*, 1 Met. (Ken.) 240; *Woods v. Finnell*, 13 Bush. 628; *Kelton v. Bevins*, 5 Am. Dec. 670; *Bell v. Graham*, 9 Id. 687; *Smith v. Zent*, 59 Ind. 362; *Evans v. Thompson*, 12 Heisk. 534; *Scott v. Shelor*, 28 Gratt. 891; *Carleton v. Taylor*, 50 Vt. 220; *McKown v. Hunter*, 30 N. Y. 625; *Fagnan v. Knox*, 66 Id. 525; and that the prosecution should have terminated in favor of the defendant therein: *Spring v. Besore*, 12 B. Mon. 551; *Wood v. Laycock*, 1 Met. (Ken.) 192; *Winn v. Peckham*, 42 Wis. 493; *Leever v. Hamill*, 57 Ind.

is necessary for the plaintiff to prove malice in fact as distinguished from malice in law. Malice in law is where malice is established by legal presumption from proof of certain facts as in actions for libel, where the law presumes malice from proof of the publication of the libelous matter. Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove express malice in the popular signification of the term, as that defendant was prompted by malevolence, or acted from motives of ill-will, resentment, or hatred, towards the plaintiff. It is sufficient if he prove it in its enlarged legal sense. 'In a legal sense any act done willfully and purposely to the prejudice and injury of another which is unlawful, is as against that person malicious:' *Commonwealth v. Snelling*, 15 Pick. 337. 'The malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, it is in legal contemplation, malicious:' *Wills v. Noyes*, 12 Pick. 324; see, also, *Page v. Cushing*, 38 Ma. 523; *Humphries v. Parker*, 52 Id. 502; *Mitchell v. Wall*, 111 Mass. 492; *Pullen v. Glidden*, 66 Ma. 202, 204." The acquittal of the defendant is not of itself evidence of the malice of the prosecutor: *Garrard v. Willet*, 4 J. J. Marsh. 628; *Ullman v. Abrams*, 9 Bush. 744; nor is a discharge from prosecution by a *nolle prosequi*, *prima facie* evidence of such malice: *Yocum v. Polley*, 1 B. Mon. 358. The burden of proving the malice of the defendant lies on the plaintiff in the action of malicious prosecution, and until he gives some evidence of malice independent of any inference of the verdict of acquittal, the defendant will not be called upon to prove anything: *Ullman v. Abrams*, 9 Bush. 744.

PROSECUTION OF CIVIL ACTION.—A comprehensive rule is laid down in *Potts v. Imlay*, 7 Am. Dec. 603, in regard to one's responsibility for the malicious prosecution of a civil suit. It is there stated that an action of malicious prosecution would not lie for prosecuting a civil suit in a court of common law, having competent jurisdiction, by the party in interest, unless the defendant has been arrested without cause, and deprived of his liberty, or made to suffer other special grievance, different from and superadded to the ordinary expense of a defense. What cases are embraced by the exceptions made by this rule, is a question that has been differently answered in different cases. But the courts generally agree that an action for a malicious prosecution will lie for maliciously and without probable cause, arresting the person of the plaintiff, levying an attachment upon his property, or instituting proceedings in bankruptcy against him: 1 Hilliard on Torts, pp. 443, 457, 4th ed.; Cooley on Torts, 187.

UPON THE ORDER OF PROOF, *Wheeler v. Nesbitt*, 24 How. 544, prescribes the following: "To support an action for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in his acquittal. He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice. Proof of these several facts is indispensable to support the declaration, and clearly the burden of proof in the first instance is upon the plaintiff to make out his case, and if he fails to do so in any one of these particulars, the defendant has no occasion to offer any evidence in his defense." See, also, 1 Hilliard on Torts, 441.

BUCKNER v. TERRILL.

[LITTELL'S SELECT CASES, 29.]

THE EXECUTION DOES NOT ABATE by the death of the plaintiff after a *scire facias* has been levied; but a *venditioni exponas* may issue.

APPEAL. The opinion states the case.

By COURT. As the errors assigned relate only to the proceedings by the ministerial officers, the clerk, sheriff, etc., none of which, except one, have been complained of in the inferior court, the principles decided by the case of *Smith v. Carr*, Hard. 305, forbid an inquiry into any but that which was adjudicated by the inferior court: that is, that the execution ought to have been quashed, because it was issued after the death of Terrill who was the plaintiff below. To this objection it is proper to observe that the original *fi. fa.* had been executed, and one or more writs of *venditioni exponas* had issued thereon in the lifetime of Terrill. The *fi. fa.* being executed could not abate by the death of Terrill, and the subsequent writs of *venditioni exponas* were only in the nature of a continuation of the original execution, and therefore it could not be necessary to issue any *scire facias* whatever.

Judgment affirmed.

See Freeman on Executions, sec. 37.

PAWLING v. SPEED.

[LITTELL'S SELECT CASES, 77.]

THE CONSIDERATION OF NATURAL AFFECTION for the assignment and delivery of a bond for the conveyance of land renders the assignment valid so that a court of equity will not vacate the same.

BILL in equity. The opinion states the case.

By COURT. On the fourth of March, 1802, Henry Pawling exhibited his bill against James Speed and the heirs and devisees of William Pawling, to compel them to convey to him six hundred acres of land, for which James Speed has passed his obligation to said Henry, bearing date on the twenty-third of May, 1786. The material allegations in the bill are: That in the year 1789, the complainant was about to go from Kentucky to Richmond, and was persuaded by his wife to make some provision

house of Henry Pawling, the complainant; and that, soon afterwards the said William and Henry talked about bargaining for the land, which said Henry had purchased of James Speed.

On the part of the defendants these important facts are clearly established: That the complainant acknowledged to divers persons that he had sold the land in question to his brother William, and to some, that William had paid him for it; that, as far back as the year 1790, William Pawling was in possession of the land, living on it and improving it until he lost his senses in 1797; and even after he moved off, the land was rented out for his benefit. The possession of the said William continued long after the complainant knew that he, William, had possession of the bond of Speed, with the assignment indorsed. This assignment, acknowledged by the bill, bears date about two years previous to the existence of the events and circumstances stated by the complainant as inducing the assignment.

The reason assigned for permitting William Pawling in his life-time, and his representatives since his death, to retain possession of the bond, without demand made or suit brought until upwards of fourteen years after the assignment bears date, is very unsatisfactory. The pendency of the suit between Speed and Wilson, and the belief that Speed's claim would prove the weaker, is no excuse for permitting William Pawling to hold the bond on Speed until the action of detinue would have been barred by the statute. If Speed prevailed against Wilson, the bond on Speed was necessary to the complainant, as his evidence of his claim against Speed for the price of ten shillings per acre, with interest to be refunded by Speed. The suit between Speed and Wilson was no impediment against any proceedings which Henry Pawling might have otherwise used against William to compel him to deliver up the bond on Speed. But if we are to understand Henry Pawling as meaning that there is a vast inequality between the sum which Speed would have been bound to refund and the value of the land, enhanced even beyond the ordinary value of lands in the vicinity, by the establishment of the seat of justice of Garrard county, in the year 1797, upon the land in controversy, that for the former he did not mean to deny the validity of the assignment; but that he had never assented to the assignment of the latter to his brother William, and was therefore waiting the event of the suit between Speed and Wilson, to determine whether he would make claim upon William for Speed's bond, then, indeed, it would appear from the exhibits and depositions that

Henry Pawling has furnished the true key to unlock the wicket of his secret intentions. But these intentions were formed too late, or not signified until Henry Pawling had no right to modify the assignment, without the concurrence of William or his representatives. The depositions of Jonathan Forbes, Elizabeth Gilmore, Matty Leiper, Jennett Wilson, John Wallace and Henry Speed, united with the assignment of Speed's bond to the said William Pawling, are satisfactory evidences of a sale from Henry to William Pawling of the land in controversy; and therefore the circuit court did right in dismissing the bill with costs.

Decree affirmed.

THE VALIDITY OF A DEED OF GIFT came before the court subsequently in *Stewart v. Dasley*, Littell's Select Cases, 212, wherein it was held that such a deed, though liable to be set aside by creditors, was, nevertheless, binding on the parties. Upon the same subject, see *Salmon v. Bennett*, 7 Am. Dec. 237, and *Verplank v. Sterry*, Id. 343, and the notes thereto.

BOBB v. BOSWORTH.

[LITTELL'S SELECT CASES, 81.]

ONE WRONGFULLY DISPOSSESSED OF HIS GOODS may retake them wherever he can find them, provided it be not done in a riotous or forcible manner.

A FORCIBLE ATTEMPT TO RETAKE GOODS may be repelled by force, and if the one making such forcible attempt wound the other, an action for the battery will lie in favor of the latter, although the first may have had the better claim to the property.

IN AN ACTION FOR ASSAULT AND BATTERY, under the plea of not guilty, with leave to give the special matter in evidence, anything amounting to a legal justification may be given in evidence.

ACTION for an assault and battery. The opinion states the case.

By Court, TRIMBLE, J. This was an action of assault and battery, brought by Bosworth against Bobb, in which "not guilty" was pleaded, with leave to give special matter in evidence. A verdict having been found for the plaintiff, a new trial was moved for by the defendant, which was overruled. Whereupon he filed a bill of exceptions, containing the whole evidence given on both sides, and appealed to this court, in

which he hath assigned for error, that a new trial ought to have been granted.

This will depend upon the question, in what cases and in what manner can the right of recaption be lawfully exercised? There is no doubt, but that one having either the general or a special right of property in personal chattels, may, if wrongfully dispossessed thereof, retake them wherever he can find them, provided he can obtain peaceable possession; but the law more highly regards the public peace, than the right of property of a private individual, and therefore forbids recaption to be made in a riotous or forcible manner. The law, however, permits the possessor of property to maintain his possession by force, where force is used in attempting to divest his possession; the law, in that case, permits the party in possession to oppose violence to violence. It is material, whether the violence has been used to regain a possession which had been previously lost, or whether it has been used to maintain a present possession. In the former, it is unlawful; in the latter, lawful.

In the case now before the court, it appears that Bosworth, at the time the assault and battery was committed, was in possession of the slave which was the subject of dispute between the parties; that Bobb came, with others, to retake him out of Bosworth's possession in a violent and forcible manner, which was resisted by Bosworth; and in the scuffle, Bobb broke the arm of Bosworth. It is not material whether Bobb or Bosworth had the better right to the negro. Bosworth was in actual possession; Bobb could not lawfully use violence and force in regaining possession. Having broken the peace, and used force, where he was forbidden by law to do so, he must be answerable for the consequences.

The leave to give special matter in evidence under the general issue, authorized Bobb to prove anything, which, if pleaded, would have made a good justification in law; but the circumstances made out in proof by him, did not amount to a legal justification. We are therefore of opinion a new trial was properly refused.

Judgment affirmed, with damages and costs.

WILLIAMS v. JOHNSON.

[LITTELL'S SELECT CASES, 84.]

TENDER OF MONEY OR PROPERTY must be made at a convenient time before sunset.

DETINUE. The opinion states the case.

By Court, BOYLE, J. This is an appeal from a judgment in an action of detinue, for a negro girl. Johnson having sold the girl in question to Williams, Williams by his deed covenanted and agreed "to let Johnson have the girl back again on his paying to Williams two hundred and fifty dollars at any time between the fifteenth of July and the first day of September, 1805." On the trial of the cause the court instructed the jury "that if the evidence satisfied them that Johnson had tendered two hundred and fifty dollars to Williams, at any time before midnight of the thirty-first day of August, 1805, though after sunset and after dark of that day, that it was a good tender under the deed aforesaid, and entitled Johnson to the negro girl." To this instruction and opinion of the court, Williams, by his counsel, excepted; and the only question now to be decided is the correctness of that opinion.

Nature has formed, and convenience has pointed out the day, as the proper time for the transaction of the ordinary concerns of human life. Though night, as well as day, is a part of natural time, and, for some legal purposes, is taken into estimation, yet it is not that portion of time which the law, founded in reason and consulting the convenience of mankind, has allotted for the tender of money or of goods, which a person may be bound by contract to pay or deliver. In 2 Salk. 624, it is held, that the last part of the day is the time the law appoints for a tender; but it must be long enough before sunset for transacting the matter which is tendered. In Bacon's Abridgement, title "Tender," it is laid down: "That although the party who ought to pay money or deliver goods, has until the uttermost time of the last day limited for the payment or delivery, to pay the money or deliver the goods, a tender is not good unless there be, after it is made, time enough before sunset to tell the money, or to examine and take account of the goods. For if a man should be compelled to receive either money or goods in the dark, there would be great danger of his being imposed upon." It was contended at the bar that this doctrine did not apply to the case before the court, and a distinction was en-

deavored to be taken between this case and those where the debt or duty was to be paid or performed on a given day. On a careful examination of all the authorities within reach of the court, we have not been able to find a solitary case warranting such a distinction, or in which it has been held under any mode of expression, as to the time of payment or performance of a contract, that a tender after dark was good. In 1 Plow. 173, where the lease was upon condition, that if the rent be in arrear after either of the feasts on which it ought to be paid, by the space of ten days, that then the lessor shall enter, etc., it was adjudged that the time for payment, to save the lessee from a forfeiture of his lease, was the last convenient time, before sunset, of the tenth day. And in 1 Inst. 202, Coke lays down the same rule as to the time of tender, in his commentaries upon Littleton, where, in the text, the case is supposed of a feoffment, upon condition that the feoffer should enter, if the rent reserved should be behind a given number of days after the day of payment. In these cases the right of entry of the lessor or feoffer did not accrue until midnight of the tenth, or last day given for the payment; but the time allowed for the tender of payment, to save the condition, was a convenient time before sunset of the tenth or last day. In principle these cases do not differ from the one before the court; and the rule, and the reasons of the rule, as to the time of tender, established in them, apply with equal force to the present.

Judgment reversed.

See the note to *Bates v. Bates*, *post*, in regard to the time of day when the tender should be made.

BRYAN v. BECKLEY.

[LITTELL'S SELECT CASES, §1.]

TO RESTORE LOST LINES AND CORNERS, no departure should be made from the course or distances except in cases of necessity, and where it is necessary to depart either from the course or the distances, the distances ought to yield.

ALLOWANCES FOR THE VARIATION of the magnetic needle from the true meridian are to be made in all cases where lost lines and corners are to be renewed. Allowances are also to be made for the unevenness of the ground over which each line passes.

A MISTAKE IN A DISTANCE committed in the original survey on one line is presumed to have affected the opposite line only.

A MISTAKE IN ONE COURSE, evidenced by applying the patent to the ground, cannot be applied or be made by presumption to affect any other course named.

JUDICIAL NOTICE MUST BE TAKEN of the variation of the magnetic from the true meridian.

VISIBLE AND ACTUAL LANDMARKS are to be preferred in restoring lost lines and corners; if they cannot be ascertained resort must be then had to the courses and distances.

RELIEF IN EQUITY should not be granted further than the complainant's claim is reasonably certain.

WRIT OF ERROR. The opinion states the case.

By Court, BIRB, C. J. The present cause comes before this court upon a writ of error to the decree of the Fayette circuit court, subsidiary to the former opinion of this court, and the consequent decree, whereby the circuit court was directed to ascertain and restore the lost lines and corners of Beckley's military survey. That opinion and decree need not be herein cited; it will be found under the title of *Beckley v. Bryan and Ransdale*, in the printed decisions, p. 107; Sneed, 91.

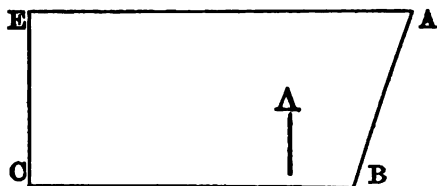
The case was this: Beckley was complainant in chancery, claiming under a survey made in 1774 by virtue of a warrant for military services; his survey was confirmed by the statute of Virginia of 1779; but Bryan and Ransdale had obtained letters patent, containing a grant for a part of that survey, founded on posterior rights, but elder in date than the letters patent granting the land to Beckley. The military survey purported to be of two thousand acres, but contained much surplus; the grant to Beckley described the land by reference to four courses and distances, and as connecting four corners designated by marked trees. Two lines could not be traced by any visible marks, and two of the corners could not be found. The two corners found were connected by the line between them, and another line from one of those corners was visible; but the distance on that line was not terminated by the existence of the corner trees called for; it was in fact, and so named in the grant to Beckley, the longer line of an adjoining survey. So that the proposition formerly before this court was, one line of the survey being ascertained and visible on the land by its terminating corner trees, and another line from one of those corners being ascertained as to the visible direction thereof, how shall the two remaining corners and lines be ascertained, restored and connected with those actually existing, so as to close the survey by the courses and distances specified in the grant? The court, in the former opinion and decree, after rea-

soning upon the case and giving the directions to be observed by the inferior court, drew this corollary: "From his northwesterly corner, an elm, buckeye, and ash, extend a line south, twenty degrees west, four hundred and sixty poles; from his easterly corner, a white walnut and hoopwood, extend a line southwest with a line styled in his grant Wm. Preston's five hundred poles; the extremities of those two extended lines will be the lost corners; and then connect those corners with a line running parallel to the line which connects the two first-mentioned corners, and the survey will be closed."

In attempting to carry that decree into execution, new difficulties have occurred in the court below by a disclosure and development of facts (by the report of survey) not before exhibited to this court. The most material facts newly discovered are these: That an actual mistake has happened in surveying the ground originally, by running the given line before mentioned variant in fact from the course intended and certified in the original plat and certificate of survey; lastly, a greater excess of the given line beyond the distance specified therefor in the grant than was represented formerly to this court. Before the former opinion of this court was given, the attention of the parties was attracted to objects of greater importance and of greater collision; upon going on the ground to prepare for executing that opinion, they were particularly directed to the points above stated. In adjudicating upon these subjects, it is distinctly to be understood that we feel ourselves bound to adhere to the principles of the former decision, as well because we are fully persuaded that they are correct in themselves as because, if they were not orthodox, we have no lawful power to change or oppugn their application to this controversy. So far as they apply we disclaim all and every authority to counteract them by any other. If the case in its new features can be adjusted according to the principles of the former decision, taken in their true spirit and effect, then assuredly it must be so decided; where those principles fall short, others apposite and co-adjutant may be applied.

For restoring and renewing lost lines and corners, the following principles are contained in the former opinion, viz.: 1. "That nothing but necessity will justify a departure, either from course or distance;" 2. "When a departure from either course or distance becomes necessary, that the distances ought to yield;" 3. That in all cases where lost lines and corners are to be renewed, due allowances must be made for the variation

of the magnetic needle from the true meridian; 4. That proper allowances are to be made on each line for the unevenness of the ground over which it passes; 5. That a mistake in distance committed in the original survey, on one line, could have affected the opposite line only, "and the presumption in violation of the length of the other lost lines, cannot be carried further." From which may be deduced as a rational inference this sixth principle: That a mistake in one course evidenced by applying the patent to the ground, cannot be applied or be made by presumption to affect any other course named; because the courses were taken from the quartered compass by the magnetic needle, and therefore a mistake in one course does not necessarily or probably argue a mistake in running any other course. Having thus premised, we come to the decree of the circuit court now complained of, as being contrary to the former decree of this court, and to the facts established by the surveyor's report, upon which the said decree complained of was predicated. The surveyor's report confirmed and decreed by the circuit court has exhibited Beckley's grants as bounded and closed by the lines, courses, distances, and corners following, and represented in the annexed diagram:



A, white walnut and hoopwood, as expressed in the grant; E, elm, buckeye, and ash, extant, as likewise expressed. Line A to B, south forty-three degrees west, five hundred poles. Patent course and distance named for that line, south forty-five degrees west, five hundred poles; corner called for at B not extant. B to C north sixty-nine and one-half degrees west, seven hundred and ninety-three poles, being parallel to E A; course and distance expressed in the grant north seventy degrees west, six hundred poles; corner named at C not extant. E to C, south twenty and one-half degrees west, at right angles to E A, which line the surveyor reports extended four hundred and sixty poles only, falls seventeen poles short of intersecting the line B C. The patent course and distance of E C, south twenty degrees west, four hundred and sixty poles. E to A, south sixty-nine and one-half degrees east, nine hun-

dred and eighty-four poles; patent course and distance, south seventy degrees east, eight hundred poles.

The errors assigned in this decree are: 1. "The inferior court has erred in not pursuing the decree of the court of appeals, which they have not done either in its spirit or in its letter;" 2. "The inferior court erred in extending the line E C beyond the distance prescribed for that line by the court of appeals;" 3. "In not having allowed on the line, E C, two degrees east, variation of the magnetic needle from the true meridian, that being the variation, or not in allowing some other variation to the east." The variation of the magnetic meridian from the true meridian is recognized by the statutes and by the former opinion of this court. That such variation was eastwardly of the true meridian at the time of the original survey in 1774, that it had progressed eastwardly from that time until the time of making the survey preparatory to the decree now complained of, is one of those principles acknowledged by scientific men, which this court are bound to notice as relative to surveys, as much as they would be bound to notice the laws of gravitation, the descent of the waters, the diurnal revolution of the earth, or the change of seasons, in cases where they would apply. The particular degree of variation is difficult to be ascertained, and the method of ascertaining the variation to be allowed was directed in the former opinion. From the acknowledged eastwardly variation at the time of the original survey, compared with the survey upon which the decree complained of is predicated, it is evident that the courses of Beckley's military survey, as inserted in his grant reciting the survey, were ascertained by the magnetic needle without regard to the true meridian, and such we believe was the prevailing practice of the country at the time of that survey. Perhaps not a single instance of a contrary practice has occurred in original surveys, at least not an instance to the contrary has fallen under the notice of this court. Applying these observations to the case before us, it is apparent that a gross error was committed in running the existing line of Beckley's survey, for the line as now reported, is south sixty-nine and a half degrees east, which would make the variation of the magnet westwardly instead of eastwardly. This mistake is further proved by adverting to the course of the line A B as now reported, for it is only south forty-three degrees west, instead of forty-five degrees as called for in the grant, that is to say a variation of two degrees eastwardly had intervened since 1774, which it is believed, is about the average variation which

has been found by those who have traced a considerable number of the surveys of 1774, and compared the variations generally in those surveys with the variations of the magnet about the year 1802. But whatever might have been the variation in 1802, the time when the preparatory report was decreed upon by the court, whether two degrees eastwardly, or more or less, it is evident that the circuit court erred in communicating to the line B C, the mistake, and westwardly variation of the existing line E A, which is contrary to the first and sixth principles recited. For it is evident that the course of the line B C has been made to depart from the course called for in the grant, and without necessity. Neither is this departure owing to a due allowance for the magnetic variation, but an undue and improper westwardly variation has been given to it instead of an eastwardly. The circuit court have no doubt fallen into this error by attending to the direction that this line should be parallel to the given or existing line without examining that direction in conjunction with the principles of the decree, but nakedly and abstractedly, as well from those principles as from the additional light afforded by the report to which that direction has been applied.

According to the grant those lines appeared parallel; the court of appeals, not informed of the mistake committed in the existing line, directed the corresponding line to be renewed by running a parallel. But it is evident from the first, second, third and fifth principles extracted from that decree, that if the court had been informed of the mistake existing in that line they could not have directed a parallel to it without doing violence upon the very principles which they meant to preserve unimpaired. The mind cannot for a moment assent to the proposition that by any rational construction of the former, the court have intended, by introducing the word "parallel" to produce a departure from the course of that line as expressed in the grant after due allowance was made for the variation of the magnet. If any intention of departing from the course, except from inevitable necessity, had been intended, the direction to connect the extremities of the two lines, the one of five hundred poles, and the other of four hundred and sixty poles would have been nugatory; for a line run from those extremities to connect them would have closed the survey. But so to connect those lines did not comport with the views and intention of the court. Such a connection might have, and in fact would have produced a departure from the patent course expressed for that line. For

it is a truth that the courses and distances named in the grant, without any variation, without mistake in any one distance, without any mistake in course, and tried upon a perfect plane, will not close the survey. To guard against such an event, and against mistakes; the court therefore added that these extremities were to be connected by a line "parallel to the line which connects the two first-mentioned corners;" which provision was only tantamount to a direction to observe the patent course, for in the patent those lines were apparently parallel, each to the other. The opinion does not notice any mistake or departure in the given line. The very decretal order declares that Beckley was to have a decree for so much of Bryan's settlement survey, as should be found to be within Beckley's military survey, when its lost lines and corners are run and fixed conformably to the exception contained in the foregoing opinion; and that exception expressly declares that the two lost lines are to be run from the corners extant, and extended on the courses, and to the distances called for in the plat and certificate of survey, making a proper allowance on each line for the unevenness of the ground over which it passes, "and also to preserve the course of the other lost line as called for in the same." Hence it may be affirmed with confidence, that a departure from the course is repelled by every part of the former decision. The transfusing a mistake in one course into another course expressed in the patent, and thereby producing a departure from that other course as is done by the decree complained of, was contrary to the manifest spirit and intention of the former decree of this court in the premises. For the same reasons the decree of the circuit court is erroneous in establishing the line of four hundred and sixty poles at right angles to the existing line, since thereby a similar departure will be produced from the corresponding course of that line named in the grant, and the mistake in the given line infused into the line of four hundred and sixty poles; which supports also the first, as well as the third members of the assignment of error.

Upon the second member of the assignment, it must be remarked, that although the surveyor has reported that the line of four hundred and sixty poles fell short by seventeen poles of intersecting the parallel line which he had run, yet by so reporting, he has thereby convicted his work of an error somewhere. That error may have been in some one or more of the courses, or in one or the other of the distances, or in the allowances made for unevenness of ground. Because if no such error

had been committed, taking the courses and distances as reported by himself throughout, the survey will close by accurate delineation on a plane surface, or according to calculation by latitude and departure. This is but another memento, that partial mistakes or inaccuracies should never be suffered to vitiate a claim to land, and induces a remark that reasonable accuracy can never be attained in completing this business, without good instrument, careful chain-carriers, and such allowance or other safeguard, for unevenness of surface as will be equivalent to horizontal admeasurement upon which the art and rules of surveying are founded. It further appears that the decree of the court of appeals heretofore made in the premises, has not been carried into execution by the decree complained of, in this, that due allowance has not been made for the variation of the magnetic meridian. The circuit court have, in fact, communicated to every line to be renewed, the mistake which had been committed in the given line, and thus have closed the survey upon a mistake, and have thereby contravened the decree of this court by departing from the courses of the grant in the lines to be renewed.

We would have it understood, that in alluding to courses of the grant as to the last lines, we mean they shall be run with proper allowances for the variation of the magnet since the date of the original survey, to be ascertained in the mode pointed out in the former decree, so as to close the survey, and fix the lost lines and corners where they were originally, according to the survey recited in the grant. The ancient lines and corners now lost, are the objects to be attained by the best evidence the nature of the case now affords, to wit, the description as certified by the surveyor and recited in the grant. It is further to be understood, as to those lines which are extant, or whose bearings are ascertained by existing corners, they are to govern, however variant from the courses called for. It is to the lost lines and corners that these rules are to be applied, where the ancient boundaries are visible and identified, resort to courses and to distances is unnecessary. Visible and actual boundaries as rules to govern the property of men, are far preferable to ideal lines and corners, but when these actual landmarks fail, we must resort to the next best evidence, courses and distances, as producing a reasonable degree of certainty, and a necessary security against the acts of the fraudulent and depraved, and against time and the elements.

It now appears that the courses and distances expressed in

the grant, when extended from the remaining corners of this survey, will not close as well, on account of some inaccuracy in the original certificate of survey, when tested by calculation, or on a plane, even according to the courses and distances in the grant expressed, as on account of the particular mistake before-mentioned as to the given line. The case is provided for in the last sentence of the sixth section of the former opinion. The length of one or the other of the lines of five hundred poles, or four hundred and sixty poles; that is to say, of A B or E C must be departed from, and then the length of the one which is made to yield must be determined by calculation. We say the one or the other, because there is no necessity for both to yield, and to make them both do so would be a departure from the spirit of the first and fifth principles, and to the second case put, in the section just alluded to, a departure from distances even ought not to be indulged further than necessary. A departure in the distances of both lines is not necessary; either lengthening the line of four hundred and sixty poles, or shortening that of five hundred poles will do, and the section directs a lengthening or shortening, but not to do both unless upon necessity. The former opinion excludes the idea of deciding the matter by going around from the beginning called for in the grant, in the progressive order of the courses and distances therein recited; because, by the fourth section of the opinion, it is clearly to be understood that the order of the courses in the certificate of survey is no evidence that the same order was observed in executing the survey. But there is a principle of equity which seems to be decisive on this subject; namely, that a complainant in equity ought not to have relief further than his claim is reasonably certain. Now it is evident that if from the extremity of the line of four hundred and sixty poles (from C), a line is extended the patent course to intersect the line of five hundred poles (A B shortened), and from the extremity (B) of the line of five hundred poles, a line be extended the patent course to intersect the line of four hundred poles (E C) extended, the claim to all the land between the two lines is *in dubio*; that land may have been included or excluded by the grant. And this argument would apply also to an extension and diminution of the distances on the lines E C and A B in equal proportions. But as to all the lands which would be included by retaining the line of four hundred and sixty poles in length, and reducing the line of five hundred poles, by calculation, to close the survey, the grant would be certain in every part, and for that only the claim should be established.

It is, therefore, decreed and ordered, that the said decree of the circuit court be reversed and set aside, and the cause remanded to have the former decree of this court carried into execution according to the principles thereof in the said opinion contained, and as now explained in a foregoing opinion, which is ordered to be certified.

And it is further decreed and ordered, that the defendant in error pay to the plaintiffs their costs in this behalf expended.

The case came before the court of appeals again, when the following opinion was pronounced, BOYLE, C. J., LOGAN and OWELEY, J.J., present:

We are of opinion that a correct exposition of the former opinion and decree of this court requires that Beckley's line, which is designated as running N. twenty degrees E. four hundred and sixty poles, should be run by making a due allowance for a variation of the magnetic, from the true meridian, from the time the survey was made until the present. This variation is reported by the surveyor to be three degrees and thirty minutes; and, consequently, the course of that line should have been N. sixteen and a half degrees E. according to the present magnetic meridian, instead of N. twenty degrees E. as the court below decreed it should be run.

For cases laying down similar principles, see *Dale v. Smith*, ante, 64, and note.

CALDWELL v. SACRA.

[LITTELL'S SELECT CASES, 118.]

IF ONE AGREES TO A TRESPASS which has been committed by another for his benefit, trespass will lie against him although the act was not done in obedience to his command or at his request.

TRESPASS. The opinion states the case.

By Court, LOGAN, J. In an action of trespass against Caldwell upon the allegation that he had, or caused to be, tied to the tail of a certain horse of the plaintiff large sticks of wood, and had so beaten and caused the said horse to run as thereby to occasion his death. Upon the plea of not guilty, the plaintiff proved the death of the horse occasioned by the sticks which had been tied to his tail, and the confession of Caldwell that his negro boy had tied sticks to the horse's tail, the horse having

frequently broken into his wheatfield. Upon being then informed by the witness that he had understood the horse had died from the abuse occasioned by the sticks which had been tied to his tail, Caldwell replied that he was glad of it.

Upon this evidence the counsel for the defendant moved the court to instruct the jury that it was not sufficient to support the declaration. Whereupon the court instructed the jury that if they were of opinion from the testimony that the defendant had either directed or sanctioned the conduct of his servant in tying the sticks to the horse's tail, or if he were present at the time, and did not prevent the servant from doing the same, that then he, the defendant, was liable to the action. The jury found for the plaintiff one hundred dollars in damages, the value of the horse proved upon the trial. The defendant also moved for a new trial upon these grounds: 1. That the verdict was contrary to evidence; 2. That it was against law; and, 3. That the court erred in the instructions to the jury. Which motion the court overruled, and the defendant upon this case has appealed to this court.

There is no point of difficulty in the cause. For, whether the slave was under the direction or sanction of the master is not material; or whether the master's direction or sanction thereof is tested by his express command, or by his presence, and not forbidding the act, or by other circumstances evincing his approbation, is equally immaterial. He is in either case liable. For the law is, if one agree to a trespass which has been committed by another for his benefit, this action lies against him, although it was not done in obedience to his command or at his request: *Bac. Abr.* 185, sec. 4, title, *Trespass*. *A fortiori*, ought the master of a slave to be liable in such case for the trespass of the slave.

Whether, in point of fact, the defendant had directed or encouraged the slave in the commission of the trespass, was a question proper for the determination of the jury from the circumstances and evidence of the case; and with whose finding the court ought not to interfere, unless it is obviously and clearly unwarranted from the evidence and circumstances. And surely in this case there is no room for an inference against the finding of the jury. The circuit court therefore very properly overruled the motion for a new trial.

Judgment affirmed.

IN TRESPASS THERE ARE NO ACCESSORIES; all who are in any manner concerned with the trespass are principals. The person who commands, or

stands by and approves, is guilty in like manner as the one who does the act: *Olsen v. Upesahl*, 69 Ill. 273; *Dedman v. Barber*, 1 Scammon, 254; *Sanders v. Hamilton*, 3 Dana, 553; *Harper v. Baker*, 3 Mon. 423; *Brown v. Perkins*, 1 Allen, 89; *Alfred v. Bray*, 41 Mo. 484; stating the rule as follows: "There seems to be no principle of law better settled than that all persons who wrongfully contribute in any manner to the commission of a trespass, or after the same has been committed for their benefit assent to it, are responsible as principals and each one is liable to the extent of the injury done:" *McMannus v. Lee*, 43 Mo. 206; *Woodbridge v. Conner*, 49 Ma. 353; 1 *Waterman on Trespass*, sec. 23.

PRESENCE, EVIDENCE OF ASSENT TO TRESPASS.—"The law is well laid down that any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks or signs, or who in any way, or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal; and proof that a person is present at the commission of a trespass, without disproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same: *Brown v. Perkins*, 1 Allen, 89; 3 *Greenleaf's Ev.*, sec. 41; *Foster*, 350; 1 *Hale P. C.* 438. But, on the other hand, it is to be borne in mind that mere presence at the commission of a trespass or other wrongful act does not render a person liable as a participator therein. If he is only a spectator, innocent of any unlawful intent, and does no act to countenance or approve those who are actors, he is not to be held liable, on the ground that he happened to be a looker-on and did not use active endeavors to prevent the commission of the unlawful acts: *Roscoe Crim. Ev.*, 2d ed., 301;" *McMannus v. Lee*, 43 Mo. 206, 208; *Miller v. Shaw*, 4 Allen, 500; *Waterman on Trespass*, sec. 212.

DAVIS v. PARISH.

[LITTELL'S SELECT CASES, 183.]

A CONTRACT TO CONVEY TO A STRANGER will, in general, be construed to be an undertaking on the part of the person contracting to convey, that the stranger shall accept the conveyance; and an offer or tender to convey will not be equivalent to an actual performance, as it would be where the conveyance is to be made to a party to the contract.

REVIVING CONTRACT.—A contract for the sale of land which has by its terms expired, cannot be revived by parol.

CROSS-BILLS for the specific execution, and to obtain a rescission of a contract. The opinion states the case.

By Court, **BOYLE, C. J.** Cross-bills were filed; one by Davis against Parish's representatives and Edward Hockerdy, to compel the specific execution of a contract for the exchange of land; and the other by Parish's representatives against Davis, to obtain a rescission of the contract. The former was dismissed, and

the latter sustained by the decree of the court below, from which decree Davis has prosecuted this appeal. It appears that an arrangement was verbally made between William Parish, John Davis, and Edward Hockerdy, Jr., to the following effect: Parish was to convey to Davis six hundred and fifty acres of land in Ohio, by a deed with a special warranty. Davis, on his part, was to convey to Hockerdy one hundred and two acres in Clarke county, without warranty, but so as to give him recourse upon William Myers, who had sold and warranted the title to Davis; and Hockerdy was to pay Parish a certain sum of money agreed upon between them as the price of the one hundred and two acres. This arrangement was to be carried into effect, provided Davis liked the land in Ohio when he saw it. Shortly after entering into it, Parish and Davis started to see the land in Ohio, but Parish taking sick on their way, proposed to Davis to reduce their agreement to writing, which was accordingly done, with this clause in it: "Provided, when Davis sees the land he should like it; if he does not, no bargain." After Davis had seen the land, he declared he did not like it, and refused to take it upon the terms agreed on. Other terms were proposed by Davis, but Parish would not accede to them. Some days thereafter, Davis, at the request of Parish, agreed to review the land as he returned from New Jersey, where he was then going, and inform Parish, on his return to Kentucky, whether he liked the land or not. It seems that when Davis first returned to Kentucky he still disliked the land, and signified to Parish his unwillingness to take it on the terms they had agreed, making at the same time proposals for other terms. But Parish being unwilling to trade upon such terms as were then proposed by Davis, after some attempts to induce him to do so had failed, Davis determined to take the land, and Parish still agreeing to give it, a day was appointed when the deeds were to be executed. They, together with Hockerdy, met according to appointment. Deeds were drawn and ready to be executed, by the consent of Davis and Parish, but the execution of them was postponed at the instance of Hockerdy, who professed a wish to obtain counsel on the deed to be executed from Davis to him; and finally he refused to receive the deed, being apprehensive of the goodness of Davis' title.

From this state of facts, it is obvious that Hockerdy was under no legal obligation to carry the contract into effect on his part. The agreement, so far as he is concerned, having never been reduced to writing could not be enforced, were there no objec-

tions to it. How far this circumstance is sufficient to prevent a decree for the specific execution of the contract on the part of Parish or his representatives, is a matter of some doubt. In general, where there is a contract to convey to a stranger, it will be construed to be an undertaking on the part of the person contracting to convey, that the stranger shall accept the conveyance, and an offer or tender to convey will not be equivalent to actual performance, as it would be where the conveyance is to be made to a party to the contract: See Co. Litt. 209 a. If this doctrine, when applied to this case be correct, as Hockerdy is under no legal obligation and cannot be compelled to receive a conveyance, it is apparent that Davis cannot so perform his part of the contract as to entitle himself to a specific execution on the part of Parish. It is, however, not material to decide upon the propriety of applying this doctrine to the present case, as we are of opinion that the contract is, on other grounds, not obligatory upon Parish or his representatives. The written contract was to cease and become a nullity, if when Davis saw the land in Ohio he should not like it. When, therefore, he had viewed the land and declared his dislike to it, the contract by its own terms expired, and after it had once expired it could not be resuscitated by parol, any more than it could have been originally created by parol. This position would be too clear to admit of a question, if instead of a few days, a few years had intervened between the expiration of the written contract and the attempt to revive it. Upon principle, however, it is evident the length of time which had elapsed can make no difference in this respect.

But an additional objection to enforcing the contract against Parish's representatives, is to be found in the defect of Davis's title. He has shown no regular deduction of title, either in law or in equity, from the original patentee under whom he claims. On the contrary, it is established, as far as such a fact can be established by negative proof, that he is not vested with a title deducible from the patentee. This defect of title in Davis does not appear to have been known to the parties at the time of the contract, and it seems to be well settled, that where an essential defect in the title is discovered before the conveyance is executed, the vendee will not be entitled to a specific execution of the contract, although the intended covenants would not have extended to such defect: 1 Fonb. Equity, 361-2; Sugden, 546, and the authorities there cited.

Decree affirmed.

COLEMAN v. HENDERSON.

[LITTELL'S SELECT CASES, 171.]

ORDER MADE ON SUNDAY.—If an order made by a judge in vacation bears date on Sunday, it is for that reason void.

MOTION to quash an execution. The opinion states the case.

By Court, LOGAN, J. This cause comes up on a motion to quash an execution which had issued on the dissolution of an injunction, but to reinstate which an order of one of the judges of this court had been obtained, though it had not been filed with the clerk previous to the issuing and service of the process. Without deciding on this point, it appears, upon an examination of the record, that the order was awarded on Sunday. Sunday is no day in law for civil proceedings. If the *teste* of a writ, etc., be on a Sunday, it is error; or if any of the proceedings of a suit be entered and recorded to be done on Sunday, it is error: See Noy's Maxims, 2, 3, and the authorities there cited.

The judgment of the court below overruling the motion to quash, must be affirmed, with costs.

JUDICIAL ACTS ON SUNDAY.—It was a principle of the common law that Sunday was *dies non juridicus*. That principle has been adopted as part of the law of the several states, and with varying statutory modifications has been so applied as to render illegal many acts that are not in their nature juridical; excepting, however, works of necessity and of charity. In regard to judicial acts done on Sunday, it may be laid down as a general rule in harmony with the doctrine of the principal case, that they are void. This rule has been enforced as to writs in civil cases, the issuance or service of which on Sunday has been held invalid: *Butler v. Kelsey*, 15 Johns. 177; *Strong v. Elliot*, 8 Cow. 27; *Shaw v. Dodge*, 5 N. H. 462; *Stern's appeal*, 64 Penn. St. 447. So, also, the levy of an execution on Sunday is void: *Bland v. Whitfield*, 1 Jones L. 122; *Pierce v. Hill*, 9 Port. 151; as well as a return made on that day: *Peck v. Cavell*, 16 Mich. 9. A warrant of arrest in a civil action, issued and served on Sunday, was considered invalid in *Moore v. Hagan*, 2 Duvall, 437, the court also holding that the Sabbath was not a holiday within the meaning of the statute rendering certain acts done on such a day valid. In criminal cases, however, a recognizance entered into on Sunday has been held binding: *Watts v. Commonwealth*, 5 Bush. 309; *Johnston v. People*, 31 Ill. 469. In passing upon the statute of the state of Illinois in this last case, the court regarded the facts before them as forming one of the exceptions mentioned, namely, a necessity. They say: "We are not to understand that the word 'necessity' means a physical and absolute necessity, but a moral fitness or propriety of the work done under the circumstances of each particular case. Any work therefore necessary to be done to secure the public safety by the safe keeping of a felon or delivering him to bail must come within the true meaning of the exception in the statute."

Under the Kentucky statute permitting the execution on Sunday of writs of habeas corpus, or process on a charge of treason, felony, riot, breach of the peace, or upon an escape from custody, the court say, in *Rice v. Commonwealth*, 3 Bush, 15, that those writs may be sued out on Sunday, as the right to execute, embraces the right to have them issued.

The secretary of the interior, in *Sayer v. Hoosac Con. G. S. M. Co.*, 4 P. C. L. J., 19, decides that there is no law of the United States prohibiting officers of the land department from transacting official business out of office hours or on Sunday, and that if the local officers are willing to receive an adverse claim it may, in the absence of any law to the contrary, be filed on Sunday.

VERDICT ON SUNDAY.—That a verdict may be received on Sunday seems now to be settled: *Van Riper v. Van Riper*, 7 Am. Dec. 576; *True v. Plumley*, 36 Me. 486; *Cory v. Silcox*, 5 Ind. 370; *Rosser v. McGolley*, 9 Id. 587; *McCorkle v. State*, 14 Id. 39; *Hoghtaling v. Osborn*, 15 Johns. 119; *Webber v. Merrill*, 34 N. H. 202; *State v. Ricketts*, 74 N. C. 187; *Huidekoper v. Cotton*, 3 Watts, 56; *Reid v. State*, 53 Ala. 402. The reason assigned for the validity of such a verdict by some of the cases is that the rendition and receiving is a work of necessity, and by others that it is merely a ministerial act and not within the prohibition relating to judicial acts on Sunday. The conditions upon which a verdict rendered on Sunday will be deemed valid, are well expressed in the elaborate opinion of Judge Manning, in *Reid v. State*. He says: "We are of opinion that when a jury, to whom a cause has been committed on a Saturday or other secular day of the week, are lawfully kept together under charge of officers of court, and are ready on Sunday to deliver in their verdict, it is lawful for the judge then to meet them with the other officers of court to receive it, and thereupon to discharge the jury and adjourn the court until the next day."

Pronouncing judgment upon a verdict is clearly a judicial act, and if done on Sunday will be null and void: *Blood v. Bates*, 31 Vt. 147; *Arthur v. Mosby*, 2 Bibb. 589; *Chapman v. State*, 5 Blkf. 111; *Allen v. Godfrey*, 44 N. Y. 433.

SUNDAY IS NOT TO BE COUNTED as one of the days of a term of court: *Read's case*, 22 Grat. 924. In construing the section that "whenever a justice shall take time to consider upon a cause submitted to him for decision, he shall continue the cause to a time to be by him named, not more than seventy-two hours from the time the same is so submitted, at which time he shall enter his judgment," the court in *Meng v. Winkelman*, 43 Wis. 41, said: "We understand the true principle to be, and so hold, that when a statute like that under consideration gives hours in which to perform a given act, and does not mention an intervening Sunday, the hours of an intervening Sunday are to be excluded from the computation of time."

The twenty-four hours beginning and ending at midnight are generally recognized as forming a day, and no exception is made in the case of Sunday. But in Connecticut the early case of *Fox v. Able*, 2 Conn. 541, held that the Sabbath comprised the solar day only, and a statute subsequently passed embodied the distinction taken in that decision: *Finn v. Donahue*, 35 Conn. 216.

AN INJUNCTION was granted on Sunday in *Langabier v. Fairbury R. R. Co.*, 64 Ill. 243, to prevent the defendant, a railroad company, from tearing up a street on that day in order to lay their road. It was there held that the issuance of the injunction was necessary to prevent an irreparable injury to property, and was a "necessity" within the definition given by *Johnston v. People*, 31 Ill. 469.

THE VALIDITY OF CONTRACTS made on Sunday depends upon the statutes of the states where they are made. Contracts were not included among those acts which were rendered void by the English statute pertaining to judicial proceedings on Sunday. At the common law contracts made on that day were not for that reason void: *Davis v. Barger*, 57 Ind. 54; *Adams v. Gay*, 19 Vt. 358; *Tucker v. West*, 29 Ark. 386. Under the statutes enacted in the different states, having for their object the setting apart of the Sabbath as a day of rest and the stopping of all trade and business on that day, money loaned on Sunday has been held to furnish no foundation for an action to recover the same: *Meador v. White*, 66 Me. 90; *Finn v. Donahue*, 35 Conn. 216; swapping horses has been held "trading" within the meaning of the statute, and illegal, so as to bar an action on the breach of the warranty of soundness: *Murphy v. Simpson*, 14 B. Mon. 337; a note made on Sunday in the course of trade was held void in *Hill v. Wilker*, 41 Ga. 449; and in *Smith v. Foster*, 41 N. H. 215, and cases cited; and a part payment on Sunday was decided not to take the case out of the statute of limitations: *Clapp v. Hale*, 112 Mass. 368; *Baumgardner v. Taylor*, 28 Ala. 687. In regard to this last position, a different construction of the statute prohibiting the performance of worldly employments, was laid down in *Lea v. Hopkins*, 7 Penn. St. 492, and *Thomas v. Hunter*, 29 Md. 406, which would appear to be the view preferred in *Beardsley v. Hall*, 36 Conn. 270. In California, contracts on Sunday are not prohibited by statute: *Moore v. Murdock*, 26 Cal. 514.

CONTRACTS NOT FINALLY EXECUTED on Sunday are not deemed void, although some of the terms may have been agreed upon on that day: *Merrill v. Downs*, 41 N. H. 72, and cases cited. Executory contracts made on Sunday are not void: *Chestnut v. Harbaugh*, 78 Penn. St. 473; so, also, a note signed on Sunday but not delivered until a week-day: *Dohoney v. Dohoney*, 7 Bush, 217; *King v. Fleming*, 72 Ill. 21. A replevin bond delivered to the sheriff on a week-day is not vitiated by the fact that it was signed on Sunday: *Prather v. Harlan*, 6 Bush, 185; and a bond for costs signed on the Sabbath but filed on another day was decided to be good in *Hall v. Parker*, 37 Mich. 590, 594, Graves, J., saying: "It was relied on as a bond which had been executed according to its import. It could not take effect from the signing, but only from delivery or filing; this took place upon a business day: *Love v. Wells*, 25 Ind. 503; *Betenman's appeal*, 55 Penn. St. 183; *Flanagan v. Meyer*, 41 Ala. 132. It has been held that a note is not impaired on account of being signed on Sunday if it be not delivered on that day: *Hilton v. Houghton*, 35 Me. 143; *Lovejoy v. Whipple*, 18 Vt. 379; *Com. v. Kendig*, 2 Penn. St. 448; *Clough v. Davis*, 9 N. H. 500; *Hill v. Dunham*, 7 Gray, 543; *Adams v. Gay*, 19 Vt. 358; see, also, *Stackpole v. Symonds*, 23 N. H. 229; and *Vinton v. Peck*, 14 Mich. 287; and the court in *Com. v. Kendig*, *supra*, decided that an official bond executed on Sunday is not void as to the parties to be protected by it; See, also, 2 Pars. on Con. 757 to 765, and notes. As this paper was framed, dated, signed and filed as a bond executed on a week-day, as it was received by the court as such a bond, and as the obligee who relied upon it had no notice or intimation that either signature had been put to it on Sunday, and as it was actually made to take effect on a week-day, the circumstance that the act of signing occurred on Sunday could not be allowed to invalidate the instrument."

BONA FIDE HOLDER OF NOTE MADE ON SUNDAY.—The validity of a promissory note in the hands of a *bona fide* holder for value in the ordinary course of business, without notice, it appearing that the note was made,

signed, and delivered on Sunday, but dated another day, was considered valid in *Cranston v. Goss*, 107 Mass. 439. The legality of contracts in general executed on Sunday was examined in this case, and upon the point in question the following opinion delivered by Judge Gray: "A promissory note given and received on Sunday, and therefore void as between the original parties might be equally void in the hands of a subsequent holder who took it with notice of the original illegality: *Allen v. Deming*, 14 N. H. 133; *Holden v. Cosgrove*, 12 Gray, 216; *Davidson v. Lanier*, 4 Wall. 447. Even if the note bore date of a Sunday, however, that mere fact would not be conclusive evidence that he took it with such notice; for, though dated on Sunday, it might have been delivered on another day, and so valid even as between the original parties: *Hill v. Dunham*, 7 Gray, 543; *Hilton v. Houghton*, 35 Me. 143. * * * It is agreed that the note (in the case before the court) bears date of a secular day; and that the plaintiff is a *bona fide* holder of the note, for a valuable consideration, and took it before it became due, without notice of any defect, illegality, or other infirmity in the same. The plaintiff, therefore, not having participated in any violation of law, and having taken the note before its maturity for good consideration, and without notice of any illegality in its inception, may maintain an action thereon against the maker. To hold otherwise would be to allow that party to set up his own illegal act as a defense to the suit of an innocent party. This view is supported by the judgments of all the courts, English and American, that have considered the question: *Begbie v. Levi*, 1 Cr. & Jerv. 180; *S. C.*, 1 Tyrwh. 130; *Houliston v. Parsons*, 9 Upper Canada, 681; *Crombie v. Overholtzer*, 11 Id. 55; *Bank of Cumberland v. Mayberry*, 48 Me. 198; *State Capital Bank v. Thompson*, 42 N. H. 369; *Vinton v. Peck*, 14 Mich. 287; *Saltmarsh v. Tuthill*, 13 Ala. 390, 406." Asserting the same principle are *Knox v. Clifford*, 38 Wis. 651; and *Johns v. Bailey*, 45 Iowa, 241.

RATIFICATION OF CONTRACT MADE ON SUNDAY.—It seemed to the court in *Adams v. Gay*, 19 Vt. 358, that in the class of contracts now under consideration, there existed a most urgent necessity to so apply the rule that no action could be maintained for anything growing out of a void contract, that it should "not be in the power of the reckless and irreligious to circumvent and defraud the unwary, under the guise of the sacredness of the time when their own injustice was perpetrated." This language is quoted with approval in Kentucky, in *Campbell v. Young*, 9 Bush, 245. The same considerations influenced the court in *Melchoir v. McCarty*, 31 Wis. 252, 256, when they laid down the rule that where a contract otherwise valid, is void by reason of having been made on Sunday, as where property is sold and delivered on that day on credit, a subsequent promise to pay for the goods made on any day other than Sunday, is valid, and an action can be maintained on such new promise. The court further state that the cases all recognize the existence of this rule though they are not uniform in assigning the reasons for it, and cite *Williams v. Paul*, 6 Bing. 653; 19 Eng. C. L. 192; *Reeves v. Butcher*, 31 N. J. L. 224; *Ryno v. Darley*, 5 Green, 231; *Adams v. Gay*, 19 Vt. 358; *Stebbins v. Peck*, 8 Gray, 553; and *Smith v. Case*, 2 Or. 190. Judge Redfield delivering the court's opinion in *Adams v. Gay*, 19 Vt. 369, says: "We think contracts made on Sunday should be held an exception in some sense, from the general class of contracts which are void for illegality. Such contracts are not tainted with any general illegality, they are illegal only as to the time in which they are entered into. When purged of this ingredient, they are like other contracts." He then states that a subsequent affirmance on another day will render such contracts valid, and urges as a ground for this exception to the

general rule of illegal contracts, that it is reasonable and necessary, and is within the principle recognized by courts of justice of relieving an oppressed party and putting it in his power to visit the oppression upon the oppressor. This doctrine is followed in *Sayles v. Wellman*, 10 R. I. 468; *Tucker v. West*, 29 Ark. 386, containing an exhaustive summary of the decisions in this country arranged with reference to the states in which they were pronounced: *Harrison v. Colton*, 31 Iowa, 16; *Gwinn v. Simes*, 61 Mo. 835. Notwithstanding these authorities, the rule they lay down is not adopted in Maine: *Plaisted v. Palmer*, 63 Me. 576, Peters, J., saying: "This court has decided that a contract made on Sunday is incapable of being confirmed or ratified by any act of the parties done on a subsequent day;" in Massachusetts: *Day v. McAllister*, 15 Gray, 433; and in Mississippi: *Kountz v. Price*, 40 Miss. 341.

HIRING HORSES ON SUNDAY.—The question whether the owner of a horse who lets it on the Lord's day to be driven for pleasure to a particular place, can maintain an action of tort against the hirer for driving it to a different place, and in doing so injuring, was answered in the negative in *Gregg v. Wyman*, 4 Cush. 322. The same point was raised for reconsideration in *Hall v. Corcoran*, 107 Mass. 251, and after careful deliberation the case from Cushing was overruled and the action for tort sustained. The defendant's liability for the injury done by him to the plaintiff's property was held not to be affected by the question whether the contract by means of which defendant had possession, was valid or not, or whether there was or was not any such contract. This decision is in harmony with *Woodman v. Hubbard*, 5 Foster, 67, and with *Martin v. Gloster*, 46 Me. 420, although contrary to that of *Parker v. Latner*, 60 Me. 528.

TRAVELING ON SUNDAY.—Many cases have arisen under the statute provisions prohibiting traveling on the Sabbath except for purposes of charity or in cases of necessity, and have been differently determined. The Maine authorities establish that an action for an injury sustained by a failure to keep a highway in repair will not lie in favor of one traveling on Sunday for pleasure: *Cratty v. City of Bangor*, 57 Me. 423. The law is also so stated in *Hall v. Corcoran*, 107 Mass. 251. In this latter citation it is said that the plaintiff's illegally traveling on the Sabbath "necessarily contributed" to his injury. A distinction was, however, made in *McGrath v. Mervin*, 112 Id. 467, an action to recover for injuries received while gratuitously assisting the defendant in digging out a sand-pit on Sunday. The rules of law, says Morton, J., "as applied to actions of tort for injuries like the case at bar are, that if the illegal act of the plaintiff contributed to his injury, he cannot recover; but, though the plaintiff at the time of the injury was acting in violation of law, if his illegal act did not contribute to the injury but was independent of it, he is not precluded thereby from recovering." The case at bar was held to fall within the first class, and the illegal act to be inseparably connected with the cause of the action, and to have contributed to it. The liability of a common carrier for injuries sustained by his passengers, through his negligence, while they were traveling, contrary to law, on Sunday, was considered in *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126. It was there held, independent of any contract between the carrier and his passenger, that the law imposes a duty upon carriers to carry safely so far as human foresight could go; that a wrong-doer is not without the protection of the law, and that the fact of the plaintiff's being on the boat while traveling unlawfully did not in any sense contribute to the explosion of the boat. "To hold the carrier exempt from liability because the plaintiff was violat-

ing the Sunday statute, would be creating a species of judicial outlawry to shield a wrong-doer from a just responsibility for his wrongful act." The reasoning of this case, taken in connection with the cases above referred to from Maine and Massachusetts, will furnish, it is conceived, the correct rule to be applied to the cases of actions by travelers on Sunday, in determining whether their traveling has contributed to their injury or not.

REES v. LAWLESS.

[LITTELL'S SELECT CASES, 184.]

FOR FORCIBLY TAKING A FERRY, neither a writ of forcible entry and detainer nor ejectment will lie.

WRIT of error. The opinion states the case.

By Court, BOYLE, C. J. This is a writ of error to a judgment for the plaintiff, in a traverse of an inquisition, finding the plaintiff in the traverse guilty of a forcible entry upon a ferry, etc.

The only question which is deemed material to be decided, is, whether a warrant for forcible entry will lie for forcibly taking possession of a ferry, and the banks and shores of a river, where the party so taking possession has a right of ferry established. We are of opinion it will not lie in such a case. A ferry is of that description of property, which, in technical language, is denominated incorporeal, and which, in legal consideration, is not tangible, like a right of way or of common, or other incorporeal right, no entry in point of fact, can in strict propriety be said to be made upon it; nor could the sheriff, in case of a judgment of restitution, deliver possession. In such a case, an ejectment would not lie, and upon the same principle, a warrant for a forcible entry would not: See Chitty on Plead. 188, and the authorities there cited.

The use of the banks or shores is a necessary incident to the ferry, and is virtually included in, and composes a part of the right of ferry, and must, therefore, as an incident, follow its principal.

Judgment affirmed with costs.

A FERRY is a liberty to have boats for passage of men and horses on the water for a reasonable toll: *State v. Wilson*, 42 Me. 2. At common law, the remedy for disturbance, obstruction or injury in the enjoyment of a franchise or of an easement, was by an action on the case, and through this form of action redress for injuries to a ferry could be obtained: *Ferry Co. v. Barker*, 2 Exch. 136; *Taylor v. Wilmington R. R. Co.*, 4 Jones' L. 277; *Newport v.*

Taylor, 16 B. Mon. 699; 1 Chitty on Plead. 161, 17th ed. Where statutory penalties have been imposed for interfering with the rights of the grantee of a ferry privilege, the enforcement of these penalties is not the only remedy the grantee has. They are considered as a mode of redress which may be resorted to, and as merely cumulative to those rights which existed at the common law: *Ward v. Severance*, 7 Cal. 126, and cases cited; *Newport v. Taylor*, 16 B. Mon. 779. The recovery in the action on the case in most of the cases would furnish but little relief where the injury complained of consisted of continued disturbances in the right of ferriage. Such repeated interruptions in the enjoyment of the ferry are considered a nuisance, which may be abated by a bill for an injunction at the suit of one having the legal franchise: *Midland Terminal etc. Co v. Wilson*, 28 N. J. E. 537; *Collins v. Ewing*, 51 Ala. 101; *Newburgh Turnpike Co. v. Miller*, 9 Am. Dec. 274; *McRoberts v. Washburne*, 10 Minn. 23; *East Hartford v. Hartford Bridge Co.*, 16 Conn. 171; 8 C. 10 How. 511; *Ward v. Severance*, 7 Cal. 126; *Newport v. Taylor*, 16 B. Mon. 781.

DORSEY v. BARBEE.

[LITTLELL'S SELECT CASES, 204.]

WAIVER OF TENDER.—The positive declaration of one to whom money is to be paid within a certain time, that he will not receive it, will excuse the tender of the money, provided the declaration is made before the expiration of the time.

APPEAL. The opinion states the case.

By COURT. The sheriff having taken, under a writ of *fiery facias* against the estate of Dorsey, a tract of land, a part of which had been previously conveyed to Barbee by a deed from Dorsey, but which had not been admitted to record, and being about to expose the same to sale of twelve month's credit, an agreement was made between Cocke, Barbee and Dorsey, whereby Cocke was to become the purchaser at the sale of the sheriff, and executed an instrument of writing, binding himself to relinquish to Barbee that part of the tract which had been previously conveyed to him by Dorsey, and to relinquish to Dorsey the residue of the tract, upon Dorsey's paying the purchase-money, and releasing Cocke from all costs, at any time before Dorsey was bound to pay the sheriff, and upon the failure of Dorsey, if Barbee should comply, he was to have the land. Cocke accordingly purchased the land, and received from the sheriff a deed, and gave his obligation for the price at twelve month's credit. The money not having been paid by Dorsey within the time stipulated, Cocke thereafter received the amount from Barbee, and executed a deed to him for the land. To be relieved against this deed, and redeem the land, Dorsey ex-

hibited his bill in equity, in which, after setting forth the agreement and sale by the sheriff, he charges that, before the twelve months elapsed, he offered to pay Cocke the money, but that Cocke refused to receive it, and that Barbee, with notice of this circumstance, received from Cocke a deed, and alleges a combination between Cocke and Barbee, to defraud him out of his land, etc. The court below, on a hearing of the cause being of opinion Dorsey had not manifested his right to relief, dismissed his bill. From this decree Dorsey has appealed to this court.

Whether the agreement upon which Dorsey goes for relief should be considered a mortgage or conditional sale, as under the circumstances attending this case, the result would be the same, we have not thought it necessary or material to determine. If it be construed in the most favorable light for the appellee, and considered a conditional sale, Dorsey by paying the money at any time within twelve months from the date, would, in equity, have been entitled to a reconveyance, or, if the money was not paid within that time, owing to the refusal of Cocke to receive it, as between him and Dorsey, and all those claiming under him with notice, the same consequences would follow. That Barbee obtained a conveyance from Cocke with full knowledge of the occurrences which had previously transpired between Dorsey and Cocke, in relation to the refusal of the latter to receive the money, we think, from the evidence in this cause, there can be no doubt. Unless Barbee had this knowledge, it is difficult to assign any satisfactory reason why he should have given a bond of indemnity to Cocke, upon receiving from him a title. Besides, Barbee, by taking from Cocke an obligation for the land, before the expiration of the time Dorsey was allowed to pay the money, seems to have evinced a design to preclude Dorsey from obtaining the land. Barbee, then, in the present contest, cannot occupy more favorable ground than Cocke, and the only material inquiry that occurs in the determination of this case, is, whether Dorsey has been prevented from paying the money within the stipulated time, under such circumstances as in equity entitle him to relief.

The evidence, it is true, does not prove a formal tender to Cocke, by the actual production of the money; but it is apparent Dorsey had the money at command, and was prevented from paying it by the positive declaration of Cocke that he would not receive it; and this, we apprehend, for every equitable purpose, was all that should be required of Dorsey. The refusal, it is true, was made by Cocke some two or three months

before the expiration of the time Dorsey was allowed to pay the money; but as by the terms of the agreement Dorsey had a right to pay it at any time within the twelve months, the offer of Dorsey to pay, and the refusal of Cocke to receive within that time, has the same operation and must be attended with the same consequences as if the tender had been made the last day upon which payment could have been made according to the terms of the agreement.

Therefore it is decreed and ordered that the decree of the circuit court aforesaid be reversed and set aside, the cause remanded to said court, and a decree there entered against Barbee to reconvey to Dorsey, by special warranty deed, all that part of the tract to which he was entitled under the agreement with Cocke, upon Dorsey's paying the amount of the debt, interest, and costs of the suit in which the land was sold.

WAIVER OF TENDER.—The production of the money is dispensed with if the party is ready and willing to pay the sum and is about to produce it, but is prevented by the party to whom it is to be paid, declaring that he will not receive it: *Farnsworth v. Howard*, 1 Cald. 215; *Bellinger v. Kilts*, 6 Barb. 273; *Stone v. Sprague*, 20 Id. 509; *Brewer v. Fleming*, 51 Penn. St. 102; *Westing v. Noonan*, 31 Miss. 599; *Hazard v. Loring*, 10 Cush. 287; *Lacy v. Wilson*, 24 Mich. 479; *Terrell v. Walker*, 65 N. C. 91; 2 Greenleaf on Ev. sec. 603; 2 Parsons on Contracts. sec. 643.

PERKINS v. RICE.

[LITTELL'S SELECT CASES, 218.]

MISREPRESENTATION AVOIDING CONTRACT.—A misrepresentation by the vendor of a saltpeter cave, of the amount of saltpeter which a given quantity of nitrous earth will produce, will authorize the rescission of the contract of sale.

IDEM.—And if the misrepresentation is clearly established, it will not alter the vendee's right of recovery, that after the representation he employed a person, in whom he had confidence, to examine the cave, and such person reported favorably.

RESCISSIION OF CONTRACT FOR FRAUD.—Where a contract is rescinded on the ground of fraud, equity will decree that the fraudulent party repay what he has received, together with interest.

BILL in equity. The opinion states the case.

By Court, OWSLEY, J. This was a suit in chancery, brought by the appellees for the purpose of obtaining the rescission of a contract made for the purchase of a tract of land, including a

saltpeter cave, with fixtures, implements, etc. The bill charges the appellees to have been induced to make the purchase by the appellants representing the capacity of the nitrous earth in the cave to yield a much greater quantity of saltpeter than from actual experiment it is found susceptible of.

The appellants deny the alleged misrepresentations and all fraud, allege the appellees in making the purchase did not rely upon any representations made by them, but upon their own examination and inspection, aided by the examination and judgment of William Jenkins, employed by them for that purpose. The court below, on a final hearing, decreed the contract to be canceled, and the appellants to pay the amount, with interest, which had been advanced by the appellees under the purchase; and from this decree the appellants have appealed to this court.

In the consideration of this cause we shall assume as a proposition incontestably established, not only by the positive evidence of witnesses, but as resulting from the circumstance of the appellants having worked the cave for a considerable time previous to the sale, that they must have known, and did, in fact, actually know when they made the sale, the capacity of the earth to yield saltpeter; and with this knowledge, it is also satisfactorily proved, not as was supposed in argument, by the deposition of Jenkins only, but by the concurrence of various others, that during the treaty for the contract the appellants represented the dirt in the cave to be capable of yielding from three fourths of a pound to two pounds of saltpeter to the bushel of dirt; and it is moreover abundantly proved, that at the time of sale the nitrous earth in the cave had become greatly exhausted, but of little value and incapable of producing anything nigh the quantity of saltpeter represented. Were this case to be determined upon these facts alone, we apprehend there could be little doubt of the appellees' right to relief. At law it would be perfectly clear, damages might be recovered for the deceit; and we can perceive no reason why in equity also, relief should not be granted. The case is not analogous to those where relief has been refused for a false affirmation of value only, but approaches more intimately the case where a vendor falsely affirms a greater rent to be paid for the estate than is actually reserved. Whilst in the former cases, as value consists in opinion, in which men frequently differ, the law will not so far regard the interest of those who have been altogether inattentive to their own concerns, as to give an action for such vague assertions, yet, in the latter case, although the rent reserved in

some measure regulates the value of the estate, as the sum paid is of a known and ascertained amount for a false affirmation in that respect, an action will lie: 2 *Ld. Raym*, 1118; 2 *Salk*. 211. So in the present case, though for a general assertion as to the value of the cave, an action might not be maintainable; yet for a false affirmation as to the capacity of the dirt to yield a certain quantity of saltpeter, though the quality of the dirt necessarily regulates the value of the cave, we suppose, according to the authorities just cited, an action would lie.

But it is said, as the appellees appear not to have confided altogether in those representations, and thereafter, aided by Jenkins, who seems to have been employed by them for that purpose, did inspect the cave before they made the purchase, it is contended, whatever otherwise might have been the consequence, the appellants cannot be made accountable. It is true, at the time the appellant John made the representations to the appellees, he informed them he was not a judge of saltpeter caves; told them not to rely upon his representations, and that if they were disposed to buy, advised them to procure some person capable of judging to examine the cave; and they accordingly procured Jenkins to go with them and inspect the cave. Notwithstanding, however, this was done, it by no means follows that the appellees were not imposed upon by the representations of the appellants. That they made the purchase under an impression that the dirt in the cave was of vastly superior quality to what it in reality is, from the evidence in the cause, there cannot be a doubt. But whether that impression was produced by the representations of the appellants or that of Jenkins, who was employed by them to examine the cave, or both, is not perfectly clear. It is probable, however, from the apparent candor with which John Perkins made the statements, that they conduced in a great degree to confirm the appellees in the opinion that the quality of the dirt was equal to what was represented. Whether those statements had that effect, we suppose cannot, however, be very material in the present case; for, as the purchase was evidently made under the belief that the dirt was equal in quality to what the appellants asserted, and as the appellants must, from the evidence in this cause, have known the contract was closed upon that impression, fair dealing and the dictates of moral justice required they should have made a candid disclosure of the real quality of the dirt; and their having failed to do so, must subject them all to the consequences which could result from a

false suggestion, if implicitly confided in by the appellees. We are of opinion, therefore, the court below correctly decreed a cancelment of the contract. With respect to the objections as to the details of the decree, they cannot prevail. As the appellants appear to have received four hundred dollars under the contract, it was strictly proper to decree that amount to be repaid with interest; and no impropriety is perceived in making the interest run until the principal is paid.

The appellees must recover their costs in this court.

LEMON v. CRADDOCK.

[LITTELL'S SELECT CASES, 251.]

SHERIFF'S DEED AFTER EXPIRATION OF TERM.—A sheriff who has sold land under an execution, may lawfully execute a deed of conveyance thereof after the expiration of his term, although another sheriff may have qualified and entered upon the duties of the office.

EJECTMENT. The opinion states the case.

Taylor and Hardin, for the appellant.

Bibb, *contra*.

By Court, **MILLS, J.** This is an action of ejectment brought by a purchaser under execution, relying on the sheriff's conveyance against the defendant in the execution. A. Craddock was sheriff of the county when the sale was made by his deputy, Paschal D. Craddock, but the deed was made by the next succeeding sheriff, and recites that the purchase-money was secured by a three month's bond returned to the office, and that the late sheriff with his deputy was out of office. The said late sheriff was, however, produced and used as a witness on the trial. It did not appear by any recital in the deed, that a certificate or receipt for the payment of the money was produced to the succeeding sheriff who made the conveyance, or any survey of the land. On the contrary, it clearly appeared that only part of the money was paid, and the rest still due. The counsel for the defendant moved the court to reject the deed and exclude it from the jury as passing no title, but the court overruled the motion and suffered the deed to go in evidence as one passing title.

It is a settled principle of the common law, recognized by sundry decisions of this court, that the sheriff who made the sale ought to make the conveyance, and that for this purpose,

he is still in office, although his successor may have entered on the duties of the same office. The party has, however, in this instance chosen to trust the succeeding sheriff to make the conveyance, although the former was accessible. The only authority authorizing a subsequent sheriff to convey, is the act of assembly, approved February 11, 1809, (4 Litt. 23), now in the recollection of this court. It is a matter of doubt, whether that act embraces sales made after its passage, and it requires considerable aid from construction, to say that it does. But it is not necessary now to determine that question, for if it be admitted that subsequent sales are included, on the authority of the case of *Trimble v. Breckenridge*, 4 Bibb, 479, the deed ought to have been excluded. It is decided in that case, that the receipt or certificate of the former, of actual purchase and payment, must be produced to the succeeding sheriff, and that a deed executed without such receipt and certificate passes no title. The deed without this requisite was, therefore improperly confided to the jury.

There are sundry other questions made in the progress of the trial, but as they arose out of the admission of this deed, they will not probably occur again. The judgment must be reversed with costs, and the cause be remanded for a new trial, to be had in conformity with this opinion.

THAT A DEED BY A SHERIFF AFTER THE EXPIRATION of his term is valid and conveys a good title to land sold by him while in office, see *Allen v. Trimble*, 7 Am. Dec. 726, and note; see, also, *Purl v. Duval*, 9 Id. 490.

STOCKTON v. OWINGS.

[LITTELL'S SELECT CASES, 256.]

INADEQUACY OF PRICE is not of itself sufficient to set aside a sale of lands under an execution.

FRAUD IN EXECUTION SALE.—Where, through the active agency of the purchaser, an execution sale was conducted with secrecy, and with the intention of obtaining the land at a great sacrifice, such sale may be declared fraudulent and void.

MOTION to set aside an execution sale. The opinion states the case.

Wickliffe, for the appellant.

Hardin, contra.

By Court, MILLS, J. This is a notice and motion, under the act of assembly, to set aside and annul a sale of lands made by virtue of an execution. Some small judgments for costs were obtained in the county of Montgomery, against the appellee, and the sheriff sold two tracts of land in one day, the one containing five hundred acres, and the other four hundred acres, the property of Owings. The sale was appointed at a house near the division line between the two tracts, and after one was sold, the sheriff went across the division line and sold the other. Both went for the sum of twenty-two, when, at the lowest calculation of the witnesses, the lands must be worth five thousand dollars, and by the highest calculation they amounted to at least seven thousand dollars. The evidence is long, and a considerable portion of it immaterial, and need not here be recited.

In deciding on motions of this character, a court is compelled to try all the facts, as well as the law, and of course ought to notice and draw just inferences and presumptions from every pertinent fact. The appellee, whose land was sold, does not appear to reside in the county, but was a partner in a store and blacksmith's shop. In these, however, he was a secret partner, and others living in the town, carried it on in their names. He had also a special agent to do some particular business in the county town, and another general agent, by letter of attorney recorded, residing in the county. His special agent had called at the clerk's office, and left word that he would pay these or any other judgments against him. Another individual had called, and required the amounts of the judgments to be taxed, but did not obtain them, the clerk being busy, and left word with the clerk where the money could be had. The clerk himself deposed that he would not have issued the executions himself, but would have paid them, had he known when they issued; but they were issued by one of his deputies.

Although inadequacy of price is not of itself a sufficient ground to vitiate a sale of this nature, yet it may, coupled with other circumstances, afford grounds for a strong presumption that the sale has not been fairly conducted. It does not, however, stand alone in this instance. The purchaser here had the control of the executions, although he does not appear to be the legal plaintiff. He pointed out the estate to the sheriff and the place of sale. On the day of sale, he and about two more individuals attended with the sheriff, and he purchased one tract at about ten and the other at twelve dollars. The sheriff de-

posed that he had advertised the land by setting up an advertisement on the morning of a court day, but did not see it there in the evening, nor was it seen by any other person, as far as appears from the record, until on the day of sale it was produced by the purchaser, on the ground, or by some one of the other individuals attending with him. Let the inadequacy of price, the number who wished to pay the execution and protect the appellee's interest, not having heard of the sale in the same town; the pains taken to pay these executions, unsuccessfully; the eye of the clerk resting upon the matter; the active agency of the purchaser in the affair; the disappearing of the advertisement, and its production on the day of sale, be all combined, they afford such a violent presumption that the transaction was conducted with secrecy and address by the purchaser, with an intention of procuring the estate at an immense sacrifice, that we cannot say that the court below, who heard the witnesses depose *ore tenus*, erred in deciding that the sale was fraudulent and ought to be aside,

The judgment, therefore, must be affirmed, with costs.

ROBERTSON v. SMITH.

[LITTELL'S SELECT CASES, 296.]

THE STATUTE OF LIMITATIONS COMMENCES to run as to a person immediately upon his arrival in the state.

DISABILITIES OF JOINT TENANTS.—Where one of several joint tenants is under no disability, the statute of limitations will run against them all.

PARCENERS AS JOINT TENANTS.—The estate in lands which heirs hold by descent from their ancestor is joint; and the nature of the estate on coming to the heirs must control the operation of the statute of limitations.

EJECTMENT. The opinion states the case.

Wickliffe, for the appellant.

Hardin, *contra*.

By Court, **OWSLEY, J.** This writ of error is brought to reverse a judgment rendered against the plaintiffs in error, for six sevenths of the land in contest, in an action of ejectment brought in the circuit court by the defendants in error. The defendants in error claim the land under a patent which issued from the commonwealth of Virginia to Jeremiah Moore, in August, 1785, and the declaration contains separate demises by the defendants in error, Weathers Smith, James Smith, Sam-

uel Smith, Temple Smith, Lane Smith, Nancy Whaley (late Nancy Smith), and Rebecca Thrift, Nancy Thrift, and Rezin H. Thrift, heirs and representatives of Sally Thrift, deceased, late Sally Smith, and George D. Smith, heir and representative of William Smith, deceased. The general issue was pleaded, and on the trial in the circuit court, the defendants in error introduced in evidence the patent to Moore, a deed of bargain and sale from Moore to Weathers Smith, bearing date the twelfth of April, 1800, and a deed from Weathers Smith to George Smith, dated the twenty-fourth of April, 1814, and proved that the patent and deeds included the land in contest, and that the lessors in the declaration mentioned were the heirs and legal representatives of George Smith, deceased; that George Smith was a non-resident, and all the lessors were non-residents, *femes-covert* and infants, except Weathers Smith, who had been in this state twenty years previous to the trial; and after introducing the report of the surveyor, made out under an order of the court in this cause, rested his case with the jury.

The plaintiffs in error then introduced a patent from the commonwealth of Virginia to Robert Sanders, for one thousand acres, bearing date in March, 1786, and after introducing title papers showing that they claimed under Sanders, proved that the plaintiff, Clements, in the fall of 1792, settled on the land under Sanders, and cleared land in the spring, 1793; that the patentee, Moore, under whom the defendants in error claim, and Weathers Smith were in the country in 1794, that the lessor, Weathers Smith, has resided in this country for upwards of twenty-two years, and that the plaintiff in error, Oakley, also settled on the land under Sanders, at the same time that Clements made his settlement.

After the evidence thus detailed was given to the jury (it being all, as is stated in the bill of exceptions, that was offered by either party), the defendants in error moved the court to instruct the jury that the statute of limitations did not run against them, they being non-residents at the time the estate was cast on them, and the court accordingly gave the instructions to the jury, except as to Weathers Smith, one of the lessors. Exceptions were taken to the opinion of the court, and the questions raised in this court involve the propriety of the instructions given to the jury. That the court erred, we entertain no doubt. From the evidence contained in the bill of exceptions, a part, if not all of the land in contest, must be admitted to have been in the adverse possession of the plaintiffs in error, for more

than twenty years before the commencement of the action of ejectment, and it is not only well settled by repeated adjudications, but, moreover, obvious from the expressions of the statute regulating the time of making entries on land, that an adverse possession for twenty years tolls the right of entry, unless the person or persons in possession of the right of entry labor under some of the disabilities prescribed by the statute. In the present case, however, no such disability is alleged in the bill of exceptions to have been proved. If, from the evidence, it could be inferred that the patentee, Moore, and his alienee, Weathers Smith and George Smith, to whom Weathers conveyed, were all, at the time the plaintiffs in error took the possession, non-residents, and had continued to reside out of this country; that circumstance could not save the running of the statute, for in 1794, Moore, the patentee, is proved to have been in this country, and as the statute, immediately on his coming to this country, commenced running against him, it would continue to run, not only against him, but also against all others claiming by purchase, as was held in the case of *May etc. v. Slaughter*, spring term, 1821, 3 A. K. Marsh. 505.

But the defendants in error do not claim the land by purchase from their ancestor, they claim it as the heirs of George Smith, and it is presumed that the instructions of the court below were given upon the supposition that their disability at the time the estate descended to them, saved the running of the statute. It is proper, however, to remark that there is no evidence in the record conducing to prove the time when George Smith departed this life. It may have been more than twenty years after the statute commenced running against the patentee, Moore, and if so, as the statute continued to run against George Smith, his right of entry was tolled before his death, and, consequently cannot have been resuscitated by any disability in his heirs.

If George Smith had departed this life before the lapse of twenty years from the time the statute commenced running against the patentee, Moore and his heirs had all labored under some legal disability at his death, according to the construction heretofore given to the statute of limitations, their right of entry would not have been barred by the lapse of time; but notwithstanding the expiration of twenty years from the statute commencing to run, they might make their entry on the land within the time prescribed by the statute, after the removal of their disabilities. But, one of the heirs, Weathers Smith, labored under no disability at the decease of his ancestor, George

Smith. He must have been above the age of twenty-one years, and was a resident of this country; and as he labored under no disability, the disability of the other heirs cannot prevent the running of the statute, either as to them or Weathers Smith, according to the case of *Dickey v. Armstrong*, 1 Marsh. 39. In that case, the disability of one of several joint tenants was held not to protect any of the tenants from the operation of the statute; and although that was the case of joint tenants, the principle there recognized embraces all cases of joint estates, and applies with full force to the case of coparceners claiming title to lands from which their common ancestor was disseised in his life-time; for be the coparceners however numerous, they constitute but one heir. As respects strangers, they have but one entire freehold in the estate which is cast upon them, as long as it remains undivided. There is a joint estate; they constitute but one tenant to the demandant's *praecipe*; and to recover the land on the seisin of their ancestor, they must all join in the *praecipe*. Thus, says Lord Coke: "If a man has issue, two daughters, and is disseised, and the daughters have issue and die, the issue shall join in the *praecipe*; because but one right descends from the ancestor, and it maketh no difference whether the common ancestor being out of possession, died before the daughters, or after; for, in both cases, they must make themselves heirs to the grandfather, who was last seised; and when the issues have recovered, they are coparceners, and one *praecipe* shall lie against them:" Co. Lit. 164 a.

It is true, this court has heretofore held that all of the coparceners need not join in a lease, but that an ejectment may be sustained upon the separate demise of each; but the principle thus recognized does not proceed on the idea of the coparceners having a several and not a joint estate. It proceeds upon the capacity of the tenants to sever their estate, and assumes the demise laid in the declaration, although a fiction, to be a severance of the estate, for the purpose of trying the right. The right is, however, joint when it descends from the ancestor to the heirs, and it is the nature of the estate, on coming to the heirs, and not the change which it may thereafter undergo by the act of the heirs, that must control the operation of the statute of limitations.

The judgment must be reversed, with costs, the cause remanded to the court below, and further proceedings had, not inconsistent with this opinion.

This case is followed in *Roberts v. Ridgeway*, Littell's Select Cases, 394, upon the principle that all the heirs must be under some disability at the time of the title coming to them, in order to bring their case within the saving of the statute of limitations. The same principle was applied to the case of plaintiffs in trover, one of whom only was an infant, in *Milner v. Davis*, Id. 436.

RICHARDSON v. MCKINSON.

[LITTELL'S SELECT CASES, 320.]

JOINDER OF DISTINCT CAUSES OF ACTION.—In chancery several complainants cannot unite in one bill to demand several distinct and unconnected matters of one defendant; nor can one complainant demand several distinct and unconnected matters of one defendant.

RIGHTS OF VENDEE ON RESCISSION.—Where, after the vendee has entered under a contract for the sale of land, the contract is rescinded on account of the misrepresentations of the vendor, and his inability to make a good title, the vendee will not be obliged to pay rent beyond the profits actually received.

IDEM—IMPROVEMENTS BY VENDEE.—Upon the rescission of a contract of sale of land, the vendee in possession is entitled to recover the value of lasting improvements made by him.

BILL to set aside a contract of sale of lands. The opinion states the case.

Talbot, for the appellants.

Bibb, contra.

By Court, *BOYLE*, C. J. In 1809, Richardson purchased of Andrew McKinson ninety acres of land, on which there was a mill seat, with a dam, and the remnant of an old saw-mill, paid part of the price, and gave his notes for the payment of the residue; and McKinson executed to Richardson his obligations to rebuild the saw-mill, and for a conveyance of the title. Richardson, after making some further payments, sold to Laudeman, and transferred to him McKinson's obligation for a conveyance, the latter having in the mean time rebuilt the saw-mill, and taken up his obligation therefor. Some time subsequently thereto, Laudeman purchased of John McKinson, the father of Andrew, a farm with one hundred acres of land adjoining the tract of ninety acres, gave his obligation for the price agreed on, and took John McKinson's obligation for a conveyance. Laudeman was put into possession of the ninety acres sold by Andrew McKinson, and erected a grist-mill and saw-mill thereon, the one rebuilt by Andrew McKinson having been swept away by a flood.

In this state of things, Laudeman and Richardson filed this bill against Andrew and John McKinson, to set aside both contracts, and to have the money paid refunded, and a compensation for improvements, alleging as grounds for the relief sought, that the defendants had fraudulently misrepresented the constancy and force of the stream on which the mills were built, and that in fact neither of them was able to make a good title to the tract sold by him. The bill abated by the death of John McKinson, and was revived against his representatives; and on a final hearing, the circuit court decreed the bill of revivor against the representatives of John McKinson to be dismissed, without prejudice, on the ground that he was improperly joined in the suit, and decreed the contract with Andrew McKinson for the ninety acres to be rescinded, because of his inability to make a good title thereto, and appointed commissioners to make and report an estimate of the lasting and valuable improvements made by Laudeman, and the rents from the time he took possession. The commissioners so appointed made their report, to which the defendant filed exceptions, alleging that the improvements were valued too high and the rents too low; and in support of the exceptions introduced witnesses to give testimony *ore tenus*, to which the complainants objected, but the court overruled their objection, and on hearing the evidence offered on both sides, quashed the report, to which the complainants excepted. The court then appointed other commissioners, and directed them, in the estimate of rents, to allow what the premises would have been reasonably worth to a person who would have managed them with a reasonable degree of skill and care, making a deduction for necessary repairs, and that in connection with this view of the rents, they should report the value of the lasting and valuable improvements, according to their real cost at the time of making them; and the court further directed the commissioners to report the value of said improvements at the time of pronouncing the interlocutory decree rescinding the contract, together with the rents or profits actually made by Laudeman. These commissioners made a report, which, on the motion of the complainants was quashed, and does not appear in the record; and other commissioners were appointed in their stead, who made a report of the value of the improvements at the time they made the estimate, and of the rents, according to what the premises would have been reasonably worth to a person who would have managed them with a reasonable degree of skill and care, and alleged they

could make no further report for want of evidence. The complainants moved to quash this report, but the court overruled their motion, and entered a final decree according to the report, and in pursuance of the interlocutory decree.

To the decree dismissing the bill of revivor against John McKinson's representatives, Laudeman has prosecuted his writ of error, and Richardson and Laudeman have prosecuted a writ of error to the final decree entered up according to the report of the commissioners last appointed. On the decree dismissing the bill of revivor, we cannot think Laudeman has any just cause to complain. To prevent confusion, and to preserve as much simplicity as possible in suits in chancery, it is a settled rule neither to permit several complainants to demand, by one bill, several matters perfectly distinct and unconnected, against one defendant, nor one complainant to demand several matters of distinct natures against several defendants. Thus, it is said, if an estate is sold out in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance, and that there must be a distinct bill upon each contract; nor could such vendor, on the other hand, file one bill for a specific performance against all the purchasers: *Cooper's Equity*, 181. Richardson might, with propriety, join with Laudeman in exhibiting the bill against Andrew McKinson to rescind the contract for the purchase of the ninety acres, because he was a party to that contract; but he could not join in a bill against John McKinson to rescind the contract made with him by Laudeman for the one hundred acres; for he was no party to that contract, and had no interest in either its execution or rescission. According to the rule before noticed, even Laudeman could not, in a bill filed by himself alone, demand the rescission of both contracts; for they were made between different persons, at different times, and for distinct parcels of land, and therefore constitute several causes of action. It is true that both the McKinsons claim under the same title, and if the bill had been brought for the purpose of coercing the title from those who hold it, and the complainants had made them parties, there would have been some propriety in demanding the title for both parcels of land in one suit; but the bill in this case not being brought to coerce the title from those who hold it, but for the purpose of rescinding the contracts, each contract must, in its nature, constitute for that purpose a separate cause of action, and upon each a several decree could alone be rendered. The decree, therefore, dismissing the bill of re-

vivor against John McKinson's representatives must be affirmed with costs.

The errors assigned on the writ of error brought by Richardson and Laudeman to the final decree entered upon the last report of the commissioners, question as well the propriety of the refusal of the circuit court to quash that report as the correctness of the decision of the court in relation to the first report.

We have no hesitation in saying that the court erred in not quashing the last report of the commissioners. Their mode adopted in that report, of estimating the improvements according to their real value in the condition in which they were when the commissioners acted upon the subject, was undoubtedly proper; but the mode in which they estimated the rents cannot be conceded to be correct. Neither party ought, in a case of this sort, to be enriched to the prejudice of the other. *Nemo debet locupletari aliena jactura*, is a maxim of the civil law founded in natural justice, and which has been frequently recognized and acted upon by courts of equity both in England and in this country. An estate may be more or less productive according to the degree of skill and care with which it may be managed; but the possessor cannot be said to be enriched, in any case, beyond the actual profits he has received, and a purchaser, in a case of this sort, ought not to be responsible for more. It has been accordingly held, where a purchaser has been let into possession, and the purchase cannot be completed on account of defects in the title, that he is not bound to pay rent beyond the actual profits he has made: Sugd. 10.

It is apparent, therefore, as the commissioners in their last report estimated the rents not according to the actual profits received by Laudeman, but according to what the estate would have produced if it had been managed with a reasonable degree of skill and care, that the estimate was erroneous, and of course the report on that ground ought, we think, without deciding the other exceptions taken to it, to have been quashed.

We are also of opinion that the circuit court erred in setting aside the first report of the commissioners on the exceptions taken to it by McKinson. We do not deem it material to decide whether testimony *ore tenus* was admissible to impeach the report, for, conceding the evidence to be properly admitted, it does not, we apprehend, show that McKinson had any just cause to complain of the report. It appears that the commissioners, in making their estimate of the improvements, valued

them according to what they thought them to be worth at the time they acted, and there is nothing in the evidence tending to prove that they labored under any undue bias, or that they were in any respect incompetent to make a just estimate of the improvements. It is true that several of the witnesses called by McKinson place a lower value on the improvements than was reported by the commissioners, but the value of a thing is but matter of opinion, and the opinion of witnesses selected by one party for the purpose of depreciating the value ought not to outweigh the opinion on the commissioners selected by the court with the assent of both parties.

With respect to the rents reported by the commissioners, it may be remarked that if what the estate might have produced, with a reasonable degree of skill and care in its management, were to be taken as the criterion, the rents reported by the commissioners would, from the evidence in the case, appear to be too low; but if the actual profits received from the use of the estate be, as we have supposed the true criterion, then it is apparent from the evidence that the rents reported by the commissioners, instead of being too low, are considerably higher than they ought to have been.

The final decree of the circuit court, therefore, must be reversed with costs, and the cause be remanded, that a decree may be entered upon the first report of the commissioners, and in conformity to the interlocutory decree of the circuit court.

RIGHTS OF VENDEE ON RESCISSION.—The measure of the compensation to which a vendee in possession under a contract of sale of lands is entitled, upon the rescission of the contract for the misrepresentations of his vendor is stated in Alabama to be the purchase-money paid, the value of permanent improvements erected in good faith, the amount of taxes paid, and interest on these several sums, deducting from the aggregate the value of the rent while the vendee remained in possession: *Bryant v. Boothe*, 30 Ala. 311; *Thompson v. Lee*, 31 Id. 292; *Baptiste v. Peters*, 51 Id. 155. This measure substantially is adopted in *Coffman v. Huck*, 19 Mo. 435; *Outlaw v. Morris*, 7 Humph. 262; *Rhea v. Allison*, 3 Head, 176; *Masson v. Swan*, 6 Heisk. 450, holding that moneys paid for insurance cannot be recovered by the rescinding vendee; *Patrick v. Roach*, 21 Tex. 251; S. C., 27 Id. 579; Chief Justice Hemphill saying, 21 Tex. 254: "The general rule of practice in suits for rescission of sales for fraud, inadequacy of price, etc., is for the parties to set up their respective equities for rents and profits, or for improvements and interest on the purchase-money, etc. This is a rule of practice in equity and has the most imperative force in our system of procedure, which enjoins as a cardinal principle that there shall not be a multiplicity of suits to settle matters properly cognizable in the same action."

RECOVERY OF PURCHASE-MONEY.—McAllister, J., delivering the opinion of the court in *Baston v. Clifford*, 68 Ill. 67, 69, makes the following classifi-

cation of the cases wherein the vendee is entitled to recover the purchase-money upon the rescission of a contract for the sale of land: 1. Where the rescission is voluntary, and with the mutual consent of the parties, and without default on either side; 2. Where the vendor cannot or will not perform the contract on his part; 3. Where the vendor has been guilty of fraud in making the contract: *Smith v. Lamb*, 26 Ill. 396; *Bannister v. Read*, 1 Gilm. 99; 1 Chit. Pl. 355; *Battle v. Rochester City Bank*, 5 Barb. 414; 4. Where by the terms of the contract it is left in the purchaser's power to rescind it, and he does it: *Towns v. Barrett*, 1 T. R. 133; *Gillett v. Maynard*, 5 Johns. 85; S. C., 4 Am. Dec. 329; 1 Chit. Pl. 356; 5. Where neither party is ready to complete the contract at the stipulated time, but each is in default: 1 Chit. Pl. 355; Chit. on Cont. (5th Am. Ed.) 632, 633, and notes. Embodying these principles are *Wilhelm v. Fimple*, 31 Iowa, 131; *Beaman v. Simmons*, 76 N. C. 43.

VENDEE'S LIEN FOR REIMBURSEMENT.—Where the vendee has paid money upon a contract for the purchase of land, which has been rescinded on account of the default of the vendor, he has an equitable lien on the land for the reimbursement of the money, similar to that of the vendor for unpaid purchase-money: *Davies v. Heard*, 44 Miss. 50; citing *Bibb v. Prather*, 1 Bibb, 313; *Shirley v. Shirley*, 7 Blackf. 452; *Taft v. Kissel*, 16 Wis. 274; *Bayne v. Atturbury*, 1 Harrington Ch. 414. Laying down the same principle are *Barbour v. Morris*, 6 B. Mon. 120; *Pilcher v. Smith*, 2 Head, 208; *Rhea v. Allison*, 3 Id. 176, where the rule in Tennessee is announced as follows: "It is settled in this state that where a man is put in possession of land by the owner upon an invalid or verbal sale, which the owner fails or refuses to complete, and in the expectation of the performance of the contract makes improvements, a court of equity will directly and actively upon a bill filed by him against the owner for an account, make him compensation to the full value of all his improvements, to the extent they have enhanced the value of the land, deducting rents and profits, and will treat the land as subject to a lien therefor: *Herring v. Pollard*, 4 Humph. 362; *Humphreys v. Hollinger*, 3 Sneed, 228-230. The same rule must apply to purchase-money paid upon the faith of the contract. These decisions go beyond the doctrine of the English courts, which only allowed the value of the improvements upon the ground either that there was some fraud, or where the aid of a court of equity was actively sought by the owner to get possession of the estate: 2 Story's Eq., sec. 1238. Judge Story and other law-writers speak of it as an implied trust or lien upon the estate itself, while in other authorities it is called an equity. This equity exists so soon as the improvements are made, attaches itself upon the land, and becomes operative against the owner, or a purchaser from him with notice actual or constructive." Washburn on Real Property, vol. 2, sec. 509, cites cases in support of the same doctrine.

THE USE OF THE LAND is considered in several of the cases to balance the interest on the purchase-money: *Talbot v. Seabree*, 1 Dana, 56; *Shields v. Bogliolo*, 7 Mo. 134; *Patrick v. Roach*, 21 Tex. 251. This rule is thus stated in *Williams v. Rogers*, 2 Dana, 374, 375: "Where there has been no fraud or manifest injustice in the conduct of either party, and the one has enjoyed the use of the land, and the other has enjoyed the use of its accepted equivalent, the general rule of equity now recognized in this court is that in decreeing a rescission for inability to convey the legal title, the land should be restored to the vendor without any account for profits, and the price should be refunded to the vendee without interest. * * * But if the vendee shall have made valuable and permanent improvements,

or shall have committed waste, or otherwise improperly injured the land, there should be an account for waste, if any, and for improvements, if any." The balancing of the rents and the interest on the purchase-money, and the allowance for improvements and compensation for waste are recognized as elements in assessing the damages to which the parties are entitled upon rescission in *Lourry v. Cox*, 2 Dana, 469. The supposition that the use of the land is equal to the use of the purchase-money, is, however, to be governed by the circumstances of each individual case so as to place the parties as far as possible in *status quo*. For example, where part of the purchase-money remained unpaid, it was held that the purchaser in possession should account for the same proportion of the total value of the rents that the unpaid part bore to the whole consideration: *Williams v. Wilson*, 4 Dana, 507. And where the land was alleged to be wild and unproductive, it was thought by the court that the rents of such a tract could not be as beneficial as the use of the paid price, and had that fact been established it appeared they would have decreed payment of interest: *Shields v. Bogliolo*, 7 Mo. 134.

IMPROVEMENTS OF A PERMANENT AND VALUABLE character which have been made by the vendee in possession must be compensated for by the vendor, as is seen by the above cited cases. The value of these improvements is to be estimated at the time when the possession was rightfully abandoned: *Lourry v. Cox*, 2 Dana, 469; or, as stated in *Masson v. Swan*, 6 Heisk. 450, at the time the vendee elects to avoid the contract. These improvements must have been made in good faith: *Thompson v. Kilcrease*, 14 La. Ann. 340; and where the vendor rescinded a contract for the sale of lands of which the vendee had taken possession, on the ground of the fraudulent representations of such vendee, it was held that the latter could not recover for the value of his improvements, and that he should be charged with rent: *Mosely v. Miller*, 13 Bush, 408.

CALDWELL v. REED.

[LITTELL'S SELECT CASES, 366.]

CONTRACT TO DELIVER GOODS—DAMAGES.—On the breach of a covenant to deliver personal property before any payment is made, the measure of damages is, as a general rule, the difference between the price stipulated and the value of the goods at the time they were to be delivered.

COVENANT. The opinion states the case.

Wickliffe, for the appellant.

By Court, **MILLS, J.** William T. Caldwell, administrator of Robert W. Caldwell, brought an action of covenant against Reed, on articles of agreement which read as follows:

"Articles of agreement made and entered into this twenty-fourth day of October, 1813, between Philip Reed of the first part, and R. W. Caldwell of the second part. The said Reed agrees and binds himself, his heirs, etc., to furnish the said Caldwell with from ten to twelve thousand gallons of good, merchantable whisky, in good, tight barrels, delivered at M.

H. Wickliffe's warehouse near Bardstown, and the mouth of the Beech Fork; one half to be delivered on or before the first day of May, 1814, and the balance on or before the first of May, 1815. The said Reed further agrees and binds himself to deliver all the whisky that he makes, or may have on hand at his farm near Bardstown, on the first day of February in each year, for which the said Caldwell agrees and binds himself to pay the sum of two shillings and nine pence per gallon, on the first day of May, 1816. Given under our hands and seals, the date before mentioned. Signed, Philip Reed, R. W. Caldwell."

The only breach relied on was the non-delivery of the ten or twelve thousand gallons of whisky, one half the first of May, 1814, and the other on the first of May, 1815. All other breaches were relinquished by an entry upon the record. After the evidence was gone through and the price of whisky was proved to be more than two shillings and nine pence on the days of delivery, the counsel for the defendant moved the court to instruct the jury that the criterion of damages in this case should be only the difference between two shillings and nine pence per gallon, and the value of the whisky on the days of delivery, and not the full value of all the whisky on those days. The court not being fully advised what instruction to give, reserved the point, and thereupon the jury found as follows: "We of the jury find for the plaintiff five thousand five hundred and forty dollars in damages, if the law arising on the point reserved be for the plaintiff; but if not, we then find for the plaintiff four hundred and six dollars and sixty-seven cents in damages." The court rendered judgment for the lesser damages found by the jury, and rejected the greater, to which the plaintiff below excepted, and to obtain judgment for the greater sum has prosecuted this writ of error.

The assignment of error also questions the propriety of the verdict as uncertain and defective, and also that the reserved point did not sufficiently appear. It is true, the verdict has not been moulded into form by the court, as is strictly proper to be done, and made to correspond with the issue, but it is written out on the record, as it was probably drafted by the jury, to express their intention, yet as it is in favor of the complaining party, and its meaning can be ascertained, we do not feel disposed to disturb it on that account. It is also true, that there is nothing on record, before this verdict, to show what was reserved, and we know that it is proper for the record to state what was reserved, or what authorized a conditional verdict, so

that the judgment of the court should appear to be the legitimate inference from the history of facts detailed in the record, yet the court caused the reserved point to be entered afterwards, before judgment. Although this may be informal, and the expressions of the point reserved are not so explicit as they might be, yet the true state of the question can be ascertained, and therefore we would rather wink at such informal proceedings, than reverse them, when substantial justice may have been done.

The main question then left, is, as this covenant on the part of the plaintiff in error, who was plaintiff below, is independent of the covenants to be performed by the defendant, the delivery of the whisky being before the payment of the price so that the plaintiff's intestate might fail on his part, and leave the defendant no redress for such failure, the covenant on his part being a precedent condition to be performed by him, ought the plaintiff to recover, as the criterion of damages, the full value of the article to be delivered, on the days of delivery, or only the difference between that value and the price stipulated by the parties? It is somewhat singular, that this question with regard to the action of covenant, which might be expected frequently to occur, has not been decided more frequently. The court, in their researches, have not met with a case in point, or a principle in the elementary writers, determining this question, and, therefore, have to take it up on the reason which ought to govern it. This silence of the books seems much to favor the idea, that the extent of damages was a matter of fact to be left to the jury, and not of law to be decided by the court. Modern decisions, however, in almost all cases of contract, have established as matter of law some general rules, subject to various exceptions, which form the criterion of damages, and measure the responsibilities of the contracting parties. Accordingly, with regard to covenants like this, engaging a delivery of personal property at a fixed period, the value of the property on the day of delivery has been decided frequently, both by this and other courts, to be the proper criterion, unless some special circumstances were shown to authorize a departure from the rule. This may, therefore, be properly to this case, as the governing principle, and the criterion of damages is the value of the whisky to be delivered, at the time and place of delivery.

The question, then, presents itself in another shape, and that is, as the plaintiff's intestate was not bound to pay the money until after the whisky was delivered, and had his action on the

failure of delivery, without being compelled to pay anything, and as he had not paid anything, and the defendant, by his failure, has lost all remedy at law to recover the price of the whisky, can the defendant avail himself of that matter, so far as to lessen the damages from the whole price to the difference between the price stipulated and the price existing on the day of delivery? The only plausible argument that we can conceive of which might be used to preclude the defendant from this mitigation, is, that it is good policy to bind men to the extent of their contracts, and that the force of stipulation ought to have full effect. To this it may be replied, that the damages to which a defendant would be subjected, would frequently be so disproportionate to the actual injury, and so destructive to the defendant, who had received no benefit from the contract, as to assume a character highly penal, and thereby defeat the policy of the measure, instead of aiding the sacredness of the contract; and the force of stipulation would be carried far beyond the injury resulting from its breach. What benefit did the defendant receive from this contract, or what benefit could he receive? Not anything. But he had violated his stipulation, and for that he ought to be made answerable for the injury he had done to his adversary. What was that injury? If he did not receive the whisky, he was not any poorer. He actually lost nothing which he before possessed. But had the whisky been delivered, as he had a right to expect, he would have had to pay the price, and he would then have been enriched, the difference between the price he had to pay, and the price which the article would then command; and this sum, and no more, ought he to be enriched by the verdict. If the price of the commodity had not risen on the day of its reception, he could reap no benefit from its payment, and therefore ought to recover nothing for its non-payment. If the price had fallen, he must have lost by the fulfillment of the contract, and he actually would gain by its non-performance, and could, therefore, have no ground to be enriched by a recovery of damages. In the latter cases, where the price remains stationary or has fallen, there will be such a motive and inducement to fulfill the contract, presented to defendants, that it will keep obligations of this nature sufficiently sacred. Where the price rises, the recovery of the additional price in damages, will be an inducement sufficiently strong, to preserve such contracts inviolable, without inflicting on men, by way of redress for civil injuries, severe penalties, which would enrich one party beyond

his injury, and impoverish the other far beyond the mild rules of law or equity, without any *quid pro quo*, or the means of getting any.

In looking over all the consequences which might result from the decision of the court below, in all its bearings which we can conceive of, as a general principle in society, we do not discover any that proves the rule deleterious or inexpedient. We would not be understood as applying this rule to cases of partial performance by the plaintiff of his stipulations, or to any case where there are mutual remedies, or to cases where the plaintiff, confiding in the contract, has expended labor or money preparing for the reception of the article, or is disappointed in another market, and other cases where circumstances may be shown well calculated to enhance the damages, for the present is a case not affected by such circumstances, and simply a failure, without any feature of aggravation.

The judgment below must, therefore, be affirmed with costs.

McKEAN v. REED.

[LITTELL'S SELECT CASES, 395.]

SPECIFIC PERFORMANCE OF PART.—Equity will not compel one to accept a deed for part of a tract of land agreed to be conveyed, and to receive compensation for the residue.

ACCORD WITHOUT SATISFACTION, and refusal to accept the satisfaction agreed, will not furnish ground for a specific execution.

ON A BREACH OF THE COVENANT OF WARRANTY, the measure of the damages is the value of the land at the time of the contract, of which value the consideration agreed to be paid therefor is the best evidence.

IGNORANCE OF THE MEASURE OF DAMAGES is no ground for relief in equity.

THE CONSIDERATION OF A DEBT by simple contract sought to be set off, must be alleged in equity as well as at law. If it is not so alleged, the decree on a bill taken *pro confesso* will be reversed.

WRIT of error. The opinion states the case.

Hardin, for the appellant.

By Court, **MILLS, J.** This is a writ of error brought to a decree in chancery, which perpetuated to some extent, an injunction on a judgment at law. The bill was taken *pro confesso*, without service of process; but an order of publication was had, and on the proof of publication the decree was rendered. The errors assigned are reducible to the two following propositions: 1. There is no equity in the bill to authorize the decree; and,

2. If there is any equity, the proceedings preparatory to taking the bill *pro confesso* were erroneous.

The judgment at law was obtained on a penal bond with a collateral condition, binding the complainants in chancery to convey, within eight months from the date of the bond, twelve hundred acres of land; and the breach assigned at law, was the failure to convey. The bill alleges that the complainants had used considerable diligence in procuring the patents to the land in due time to make the conveyance; but, by accident, one of the plats and certificates were lost; and that, at the time of filing the bill, patents were obtained to nearly the whole amount, which they are now ready and willing to convey.

Whether, after a breach at law, the chancellor will in any case, except where the breach has arisen through the acts of the plaintiff at law, compel the specific execution of a contract in favor of the party in default, is a matter somewhat unsettled, and the authorities on the point are somewhat contradictory. However the doctrine may be, as a general rule, we are satisfied that the complainants have not, in this instance, entitled themselves on that ground to the interposition of the chancellor; for they are not yet ready to complete the whole contract, by conveying all the land, and the defendant in chancery could not be bound to take part of his contract specifically, and compensation for the residue. If he could not get the whole, the election lay with him to disaffirm the whole, or to take what he could get and damages for the deficiency.

The bill further alleges that the plaintiff at law had once agreed, since the rendition of the judgment, to take part of the lands, or the whole, in discharge of the judgment; but afterwards failed to attend at a time and place appointed for that purpose, and to receive the land. This ground of equity only exhibits an accord, without a satisfaction, which the plaintiff at law might or might not accept; and as he failed to accept, it is not such an agreement as the chancellor ought to compel him to fulfill, and no relief could be granted on this ground.

Another ground of relief equity relied on is, that although there were three obligors in the bond, who were defendants at law, yet two of them were only securities for the third, and relied on the principal to make the proper defense at law, and that he had engaged to make the defense; but at the trial the principal was confined to his bed by sickness, and could not attend: that the verdict and judgment at law were rendered for too large a sum, and for far more than the purchase-money and inter-

est; that the land was rated, in the sale to the vendee, at only seventy-five cents per acre, and was at the time of filing the bill worth no more; that the land had at first been sold to one McConnell, for one dollar per acre in property, which did not amount to more than seventy-five cents in money; that McConnell had sold the same land to the plaintiff at law, now defendant in chancery, at the rate of only seventy-five cents, and that the bond on which the judgment at law was founded, was then executed to the present plaintiff at law instead of McConnell; that McConnell had failed to pay to the present complainants at law the full price of the land, but still owed a part, and had left the commonwealth, and was believed to be insolvent; that the complainants in chancery did not, at the trial at law, and even yet, know of any witness by whom they could prove the consideration for the land, stipulated to be paid by McConnell to them, or the price paid by the defendant in chancery to McConnell; that these matters rested exclusively in the knowledge of the contracting parties, and of this matter they pray a disclosure for the defendant. They allege the judgment at law was far higher than either the consideration which passed from McConnell to them, or from the defendant in chancery to McConnell, and that they did not know at the trial at law, that the consideration paid, with interest, was the proper criterion of damages, and could not have proved it if they had known it. On this ground they pray a new trial at law, or that the chancellor may reduce the damages to the proper standard; and it is on this ground, as far as we can ascertain, that the court below has granted relief.

Although these charges and allegations may, at first view afford a specious equity, yet, when analyzed, we apprehend they are not tenable. As to the charge that McConnell has failed to pay the complainants the consideration, or part of it, which he had engaged to pay, it furnished no ground for relief against the defendant in chancery, now plaintiff in error. There is no charge that he had failed to pay the consideration to McConnell for his purchase, and it is the consideration moving from him that entitled him to a remuneration in damages for a breach of the contract. Instead of taking the obligation of McConnell, he has obtained the complainants' obligation, which they have substituted for that of McConnell, and they must be supposed to bind themselves to convey the land to the defendant in chancery, at all events, and to rely on the responsibility of McConnell alone, to make good to them the consideration. If

McConnell failed, the defendant in chancery was bound to make good McConnell's failure, or to subject himself to a deduction of his demand on that account. The consideration moving from the defendant in chancery, being different from, and unconnected with that moving from McConnell to the complainants, the failure of McConnell cannot, according to the principle settled by this court in the case of *Clay v. Morrison etc.*, Hard. 421, furnish any ground of relief against the plaintiff in error.

Nor can the charge that the consideration of both contracts was a secret to all except the contracting parties, and the disclosure required by the bill, furnish a proper ground of relief. It is true, it has been settled by repeated decisions of this court that the purchase-money and interest, where no fraud is apparent on the part of the vender, is a proper criterion of damages in cases of breaches of conveyances with warranty, or bonds engaging such conveyances. But the true doctrine is, that the value of the land at the time of the contract is the proper criterion, and that the price stipulated by the parties is the best evidence of that value. But it never has been held that if this stipulated price could not be proved, the parties could not prove the value of the land at the date of the contract, by evidence *aliunde*. No doubt no such evidence is admissible; and the complainants show by their own bill, that if they had resorted to such evidence on the trial at law, they would have been more successful than if the price could have been proved by proper testimony; for they allege, that although they, or one of them, had sold the land at the price of one dollar per acre, payable in property, yet, notwithstanding the general rise of lands in the country, the land here sold was not worth more, at the time of filing their bill, than seventy-five cents per acre; and there is no suggestion in the bill that witnesses could not have been procured on the trial at law who could have testified the value of the land at the date of the contract, to have been as low as the price given by the plaintiff in error, and even lower than that agreed upon between McConnell and the defendants in error. As the *quantum* of damages was a matter properly triable at law, and the decision at law is conclusive on this subject against the interference of the chancellor, when the parties might and ought to have made their defense at law, by testimony which is not shown to be out of their reach, it follows that the plaintiffs in error ought to be bound by the verdict, and not be permitted to impeach it in equity, unless they have

shown some available excuse for not procuring and using the proper evidence on that trial.

This leads the court into an inquiry into their excuses. The first is, that one of the defendants in error was the principal, and the other two securities on the bond and the principal had engaged, and the others relied on him to make the proper defense, and he was confined to his bed by sickness at the time of the trial. Confinement by sickness being a calamity to which all are subject, and none can avoid, may, and ought to furnish frequently a proper excuse for failing to attend to such business as a trial at law; but the excuse ought to be attended with circumstances which show that that confinement precluded the whole party from paying attention to the suit. It is not necessary for us here to inquire whether a person confined ought to procure an agent to attend in his stead, or show that he could not obtain one before he could obtain relief in equity; for in this case all three of the defendants in error stood, to all ordinary purposes, in the same relation to the plaintiff, and each, as to him, was his debtor, and if one of them failed, it gave the others no right to relief; but the others ought to be bound by that failure. If a different rule should prevail, there would be few cases of judgments at law against more defendants than one, where the chancellor might not be called upon to overhaul their merits, because all rested on one, and he failed. It is not necessary for us to say that a possible case could not be made out where the failure of one to defend might not furnish a ground of equity. There may be such exceptions, but this case is not one. It is not shown that the other defendants at law, who were not sick, had not the means of knowing, and did not know, of the confinement of their co-defendant; and yet they trusted the trial to its fate, without paying any attention. Besides, it is not shown that the one who was confined by sickness, or that either of them, ever attempted to procure or introduce the proper testimony. Indeed, it is clearly inferable from the bill that neither of them intended to make the proper defense; for they allege that they did not know that the value of the land, at the date of the contract, or rather the price agreed to be given, furnished the proper measure of damages, and that they had since been advised of this matter. So that the sickness of one of the obligors, according to their own showing, could make no difference; for being ignorant of the proper amount to be recovered, they did not intend to make the proper defense, and no intimation is given that witnesses

were or ever had been summoned to show the true value of the land at the date of the contract.

The question, then, resolves itself into this: Ought this ignorance of the proper measure of damages sufficiently to excuse the failure to make the proper defense at law, and entitle the party thus failing to avail themselves of the same matter in equity? This judgment was rendered previous to any decision of this court fixing the *quantum* of damages recoverable in such cases, and it must be admitted that a different standard was often fixed by the inferior courts; but, at the same time, there was a well known difference of opinion among legal characters on the subject, and all well knew that the proper criterion had not been settled by this court. This uncertainty, if it could be admitted that a party litigant could avail himself of his ignorance of the true measure, was certainly enough to put him to a proper trial of the question, and receiving upon it the decision of the court of the last resort; and his having failed to do so in a matter purely legal ought to deprive him of the trial of the same matter in a court of equity. But we are not disposed to admit that the ignorance of the party of the proper measure of damages, ought to excuse his failure at law to make the proper defense. The measure of damages in this case was, and is, a matter of law, and every man must be presumed to know it. This is a principle which runs through all our code, and although it may not be true in fact, that a party litigant did know the law, yet it must be presumed that he did so know it. However hard this general rule may operate in particular cases, yet no other principle will answer as a general rule, for if no man could be made responsible for a breach of law until his adversary should prove that he knew the law, there could be but few recoveries had for the most flagrant violations. This ground of equity, then, that the damages were improperly assessed, cannot avail the defendants in error under the allegations of their bill in the present case.

There remains but one more ground of equity to be considered. It is alleged that the plaintiff in error owed one of the defendants the sum of eighty dollars, with interest, which he had agreed to discount against so much of the judgment at law after it was rendered. It is not stated that this sum is due by note, or any writing, and it must be presumed to be due on such a contract as would furnish grounds for an action of assumpsit at common law. To sustain such action, without writing, it would be necessary, even at law, to aver and set out the

consideration, and less cannot be required in a court of equity. The contract for the eighty dollars consisting in word only, ought to be shown to be valid to the chancellor, by stating the consideration, into which the chancellor will pry with equal, if not severer scrutiny than a court of law. This allegation is, therefore, deemed too deficient to entitle the party to any redress. This decision on the equity of the bill renders it unnecessary to travel into the regularity of the proceedings.

The decree must be reversed with costs, with directions to the court below to dissolve the injunction with damages and dismiss the bill.

SPECIFIC PERFORMANCE OF PART.—"As a part of the doctrine that the plaintiff must perform all the material terms of the agreement on his part, the general rule is settled that a vendor who has entered into an entire contract cannot enforce a specific performance upon an unwilling purchaser unless he has a good title to the whole subject-matter, and to every part of it. In other words, the failure or defect of his title, either to the whole land or to a part of it, is a sufficient ground for refusing the remedy which he seeks. Compensation will not in general obviate the objection, for a purchaser cannot equitably be compelled to pay a smaller price for a subject-matter which he did not agree to buy: *King v. Knapp*, 59 N. Y. 462; *Hoover v. Calhoun*, 16 Gratt. 109; *Jackson v. Ligon*, 3 Leigh, 161; *McKean v. Reed*, 6 Litt. 395; *Bryan v. Read*, 1 Dev. & Bat. Ch. 78; *Reed v. Noe*, 9 Yerg. 283; *Cunningham v. Sharp*, 11 Hump. 116, 121; *Buchanan v. Alwell*, 8 Id. 516; *Hepburn v. Auld*, 5 Cranch, 262; *Vreeland v. Blauvelt*, 23 N. Y. Eq. 483; *Dobbs v. Norcross*, 24 Id. 327; *Jeffries v. Jeffries*, 117 Mass. 184. But this rule is not absolutely universal. When the vendor is unable to make title to a very small part of the land, and such portion is not material to the purchaser's possession and enjoyment of the property, so that the deficiency is susceptible of compensation, a specific performance will be granted to the vendor with compensation to the vendee: *McQueen v. Farquhar*, 11 Ves. 467; *Knatchbull v. Grueber*, 1 Madd. 153; *Bowyer v. Bright*, 13 Price, 698; *Carver v. Richards*, 6 Jur. (N. S.) 667; *Stoddart v. Smith*, 5 Binney, 355; *Foley v. Crow*, 37 Md. 51; *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. Rep. 534. But this exception is very limited. If the title fails to a portion of the land, however small, which is material to the vendee's possession and enjoyment of the remainder to which title can be made, the vendor must fail of obtaining a specific performance: *Howard v. Kimball*, 65 N. C. 175; *Smith v. Turner*, 50 Ind. 367; *Taylor v. Williams*, 45 Mo. 80; *Havens v. Bliss*, 25 N. J. Eq. 363; *Botyford v. Wilson*, 75 Ill. 132; *Gregory v. Perkins*, 40 Iowa, 82; *Davison v. Perrine*, 7 C. E. Green, 87; *Walsh v. Barton*, 24 Ohio St. 28; *Holland v. Holmes*, 14 Fla. 390; *Bogan v. Daughdrill*, 51 Ala. 312;" *Pomeroy on Contracts*, secs. 347 and 450.

ROBERTS v. BURKS.

[LITTELL'S SELECT CASES, 411.]

THE CONFESSIONS OF AN AGENT, except where they are made at the time and compose a part of the acts done by him for his principal within the scope of his authority, are not evidence against the principal.

TROVER. The opinion states the case.

Bibb, for the appellants.

Hardin, *contra*.

By Court, *MILLS, J.* This is an action of trover and conversion against four defendants. In the court below, on the issue of not guilty, the jury found a verdict against all of the defendants. Two of them appear to be owners of a warehouse, and the other two did business for them as warehouse-keepers or agents. The action is brought for the trover and conversion of whisky stored by the plaintiffs in the warehouse. The only testimony adduced to charge the owners of the warehouse, was the acknowledgments of the other defendants that the quantity of whisky was in the warehouse, and that they had taken it out and shipped it aboard of a boat belonging to the owners of the warehouse, and at their order, to make up a deficiency in the load. The verdict being against all, a new trial was moved for on the ground that the verdict ought not to have been thus found, there being no competent evidence against two.

The principle, that the declarations or confessions of an agent, except they be made at the time and compose a part of acts done by him for his principal, within the scope of his authority, cannot be given in evidence to charge the principal, is too well settled to need authority to support it. The confessions of the agents in this case do not appear to have been made at the time of doing the acts, nor does it appear that they were executing any authority given them, except by their own declarations. The evidence, therefore, was incompetent as to the keepers of the warehouse, and insufficient to warrant the verdict against them. Of course the court erred in refusing to grant a new trial.

Judgment reversed.

AN AGENT'S DECLARATIONS ARE ADMISSIBLE against his principal when they are made in the performance of some act within the scope of the agent's authority and are uttered as a part of the transaction itself. When they are made outside of the employment, or either before it commences or after it is ended, they are not admissible: *Smith v. Tracy*, 36 N. Y. 79; *Bell v. Day*,

32 Id. 165; *Chicago etc. R. v. Lee*, 60 Ill. 501; *Rowell v. Klein*, 44 Ind. 390; *Lovell v. Winchester*, 8 Allen, 109; *Stenhouse v. Railroad*, 70 N. C. 542; *Robinson v. Walton*, 58 Mo. 380; *Sweatland v. Ill. Telegraph Co.*, 27 Iowa, 433; *Burnham v. Railroad*, 63 Me. 298; *McComb v. N. C. R. R.*, 70 N. C. 178; *Garfield v. Knight's Ferry W. Co.*, 14 Cal. 35; *Neely v. Naglee*, 32 Id. 152; *Ward v. Preston*, Id. 398. The rule is thus stated in *Anderson v. Rome etc. R. R. Co.*, 54 N. Y. 334, 340: "The general rule is, that the declarations of persons not parties to the suit are incompetent. But sometimes the declarations of an agent which are part of any *res gestae* which is the subject of inquiry are received against the principal. The principal constitutes the agent his representative in the transaction of certain business; whatever therefore the agent does in the lawful prosecution of that business, is the act of the principal whom he represents, and when the acts of the agent will bind the principal, his declarations respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestae*. They are then in the nature of original evidence and not of hearsay, and are the ultimate fact to be proven, and not an admission of some other fact. They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time: 1 Greenleaf's Ev., sec. 113; *Luby v. Hudson River R. R. Co.*, 17 N. Y. 131."

THE FRAUDULENT REPRESENTATIONS OF AN AGENT are admissible against the principal when they are made in furtherance of the principal's business: *Rockford R. R. Co.*, 65 Ill. 224; *Kibbe v. Ins. Co.*, 11 Gray, 163; *Wharton on Agency*, sec. 164.

CARDWELL v. STROTHER.

[LITTELL'S SELECT CASES, 429.]

A MORAL OBLIGATION TO DO AN ACT, will support an agreement to perform, and equity will not grant relief on the ground that the party made the agreement wrongfully, believing that he was legally obliged to perform. PAROL EVIDENCE SHOWING MISTAKE.—In support of an agreement to do that which a prior writing between the same parties omitted to provide for, parol evidence is admissible to show that such omission was the result of a mistake.

COVENANT TO DEFEND.—A confession of judgment by one bound by a covenant to defend the suit with good faith, is not a breach of the covenant, where it appears that no available defense could have been made at law.

COVENANT. The opinion states the case.

Pope, for the appellant.

Tulbot, Hardin, and Crittenden, contra.

By COURT. On the fourth of March, 1816, the following article of agreement was executed, sealed, and delivered by the defendant, Strother, and the intestate, George Cardwell:

"Whereas, George Strother purchased of George Cardwell, of Shelby county, two hundred and fifteen acres of land, in Gallatin county, on Crow creek, as appears by deed, bearing

date the twenty-second day of February, 1804, for which said Strother paid, in consideration therefor, one hundred and sixty-five pounds; and the said Strother having been sued by John Howard for the said land by an action of ejectment in the circuit court of Gallatin, and the said Strother being desirous of bringing said suit to a speedy termination, and the said Cardwell being equally anxious, doth now agree with the said Strother, that in case he should arbitrate or compromise with said Howard or his agent, that if the decision on said arbitration should be against said Strother, and the land should be lost, the said Cardwell agrees to pay said Strother the purchase-money aforesaid, and interest thereon from the date of said deed. And it is agreed that in case of compromise or purchase of said Howard's claim by said Strother, that in that case said Cardwell will pay whatever sum said Strother may agree to give, provided it does not exceed one hundred and sixty pounds; and it is further agreed that in case no arbitration or compromise takes place, that in that case, if said Strother defends said suit with good faith, at his own costs and expense, and shall ultimately lose said land, the said Cardwell agrees to pay said Strother the purchase aforesaid, with interest from the date of said deed, and without putting him to any further trouble of bringing suit. In testimony whereof, we have hereunto set our hands and seals, this fourth day of March, 1816. George Cardwell, [seal]; George Strother, [seal]."

Upon this agreement, Strother brought an action of covenant against the administrators of Cardwell. The declaration charges that the ejectment suit brought by Howard was not settled by arbitration or compromise; but alleges that Strother defended, at his own proper costs and charges, said suit, with good faith, and ultimately did lose the land by the judgment of the Gallatin circuit court, etc., and avers the failure of Cardwell and his administrators to pay the consideration, with interest, agreeable to his covenant, etc. The administrators pleaded covenants performed, and issue was thereto joined; and by the mutual consent of the parties, an entry was made on the record, giving leave to each party to give in evidence any matter which could be admissible under any competent plea or replication.

On the trial in the circuit court, Strother read in evidence the deed of conveyance executed by Cardwell to Strother, referred to in the agreement sued on, and which contains a special warranty against the claim of Cardwell and those claiming under

him; and after also reading in evidence the agreement declared on, the counsel of the administrators of Cardwell moved the court to instruct the jury that if they should be of opinion that the article of agreement was executed by Cardwell under the apprehension that he was bound by the condition and import of the deed of conveyance to refund the purchase-money if the land should be lost by a paramount title, that they should find for the administrators; whereupon Strother, to repel any such conclusion or inference, then offered to introduce parole evidence to prove that Cardwell, in executing the deed of conveyance, intended to execute a deed to refund the purchase-money, with interest, and the parties to the deed, at the time of its execution, were of opinion that the deed, as drawn, would, in the event of the land being lost by a paramount title, be sufficient to coerce repayment of the purchase-money, with interest. To the introduction of which evidence the administrators objected; but their objection was overruled, and the evidence admitted by the court.

Whether or not the evidence was properly allowed to go to the jury, is the first question presented for the decision of this court. It is quite obvious that the evidence was incompetent to prove any fact involved in the issue made up by the parties. Under that issue, the only inquiry for the jury to make was, whether or not the covenant had been performed by Cardwell, and the admitted evidence can have had no possible tendency to illustrate the fact of performance. But in deciding on the competency of the evidence, we should not be governed by the issue joined; but as, by consent of the parties, permission was given to introduce on the trial any evidence which could be availing under any admissible plea or replication, the evidence was properly allowed to go to the jury, if it conduced to prove any fact which might have been involved in any legitimate issue. That an issue involving such a fact might have been made up by the parties is not difficult to conceive. Under the laws of this country, defendants are permitted to impeach or go into the consideration of sealed writings by a special plea. The administrators might, therefore, have pleaded that the agreement sued on was executed by their intestate on no other consideration than his supposed liability under the covenant of warranty contained in the deed of conveyance to refund the purchase-money for the land, and interest, in case the land should be lost by a paramount title, and have averred that under that warranty he was under no obligation to refund, etc. Such a

plea would no doubt, if true, be an available defense to the action of Strother on the agreement; for as in that case, the only consideration for the agreement would be the supposed liability of Cardwell upon his covenant of warranty, when, in point of law, he was under no such liability, the agreement could impose on Cardwell no obligation, as was held in the case of *Ralston v. Bullitt*, 3 Bibb, 261.

But the effect of such a plea, might, in reply, be repelled by denying that the agreement was executed on the consideration alone of Cardwell's supposed liability under his covenant of warranty, and by alleging, that although the warranty imposed no liability, it was intended by the parties to the deed, that Cardwell should give a warranty which would compel him to refund the money, with interest, in case the land should be lost by a paramount title, and that the deed was drawn under a mistaken conception of its legal import; and by averring the agreement to have been executed by Cardwell in consideration of the sale-money received by him for the land, and to secure the repayment of that which he intended to secure by the deed, but which was not secured in consequence of the mistake in drawing the deed.

If, in point of fact, the deed of conveyance, through mistake, imposed less obligation on Cardwell than was intended by the parties, he was certainly under a moral obligation to correct the mistake; and that moral obligation, is, in itself, sufficient to support the subsequent agreement to do what the parties originally intended should be done. But it was contended, in argument, to ascertain the extent of Cardwell's original undertaking, the deed of conveyance should alone be looked to; and as by the warranty contained in that deed, he was under no liability to refund the consideration-money, with interest, on the event of the land being lost by a paramount title, the import of that deed is intraversable, and parol evidence inadmissible to prove the intention and understanding of the contracting parties, to be different from that implied by the deed. The argument would certainly be entitled to force, if the suit had been brought on the covenant contained in the deed. In that case, the legal obligation of Cardwell, would, no doubt, be measured by the words employed in the deed, and no additional obligation could be created by the introduction of extraneous evidence. But here, the suit is brought on an agreement made subsequent to the execution of the deed, and the averments which we have supposed might be made in the repli-

cation, come in aid of the agreement, and in answer to a plea which might be made, questioning the consideration of the agreement. Parol evidence of a mistake in the execution of a writing, has always been held to form an available defense against the specific execution of it, and the reason is equally strong in favor of the admission of such evidence to show the real consideration of a subsequent agreement made by the same parties.

It results that the admitted evidence was calculated to illustrate the actual inducement and consideration of the agreement sued on, and was consequently properly allowed to go to the jury. In the further progress of the trial in the circuit court, and after the evidence was gone through, it appearing that but part of the land had been recovered by Howard, the counsel for the administrators moved the court to instruct the jury that if they believed from the evidence but part of the land had been lost, they ought to find against Strother; but the motion was overruled, and the instruction refused.

We entertain no doubt of the correctness of the decision of that court in overruling the motion. Without a loss of the whole land, Strother could not be entitled to recover the whole consideration with interest; but after the loss of any part, the covenant of Cardwell was broken, and damages recoverable for the part so lost.

From the record of the suit between Howard and Strother, given in evidence on the trial, it appeared that judgment had been recovered by Howard for the land through the confession of Strother, and the court was asked to instruct the jury that in consequence of the confession of judgment, Strother could not recover in this case. The court, however, refused the instructions, and we apprehend correctly. Strother, no doubt, to entitle him to recover on the agreement with Cardwell, was bound to defend the suit brought by Howard, with good faith; but the evidence exhibited in that record, not only shows that he in fact so defended the suit, but it is apparent that the title of Howard is paramount to that purchased by Strother from Cardwell, and no defense that could have been made could have defeated Howard's recovery.

The court were also asked to instruct the jury, that if they believed from the evidence that the intestate, Cardwell, executed the agreement sued on under the impression that he was bound by the covenant of warranty contained in the deed of conveyance, to refund the sale-money and interest, in the event

of the land being lost by a superior claim, and under that mistaken impression of his right he executed the said agreement, they should find for the administrators. The instructions were refused by the court, and no doubt correctly; for if, as we have seen, the obligation may be obligatory on the intestate, in consequence of its having been given on a sufficient consideration, though executed under a mistaken conception of the legal effect of the warranty contained in the deed of conveyance, it would have been unquestionably irregular to have given the instruction without hypothecating it on the opinion of the jury on the evidence in relation to the consideration.

Judgment affirmed.

MONTJOY v. HOLDEN.

[LITTELL'S SELECT CASES, 447.]

PARTNER'S POWER TO SELL GOODS.—Where one partner sold all the goods of the firm, and, against the will of his copartner, broke into the store with the purchaser to whom he delivered the goods, it was held that either partner had a right to sell all the goods, and that, unless some of them had been destroyed, trespass would not lie against a partner at the suit of a copartner.

TRESPASS. The opinion states the case.

Talbot, for the plaintiffs.

Bibb, *contra*.

By COURT. This was an action of trespass, brought in the circuit court by Holden, to recover damages against Thomas and Alvin Montjoy for forcibly entering a store-house and taking therefrom a quantity of merchandise belonging to the firm of Holden & Montjoy. The trial was had in that court on the general issue, and a verdict for two thousand one hundred and eighty dollars and eighty and three fourths cents found for Holden, and judgment entered thereon against the Montjoys. The questions made in this court involve the correctness of the opinions given by the circuit court on motions made by the Montjoys for instructions to the jury.

It appears from the evidence contained in the record, that Thomas Montjoy, one of the defendants in the circuit court, and the plaintiff, Holden, were partners in trade and rightful owners of the merchandise for which the damages are sought to be recovered in this case; that previous to the alleged trespass, the partner Montjoy sold the merchandise to the other defendant,

Alvin Montjoy, and others; and that without the assent of Holden, and against his will, the defendants procured the storehouse to be broken open, caused the merchandise to be invoiced, and refused to permit Holden to enter the house or exercise any control over the goods; but there was no evidence conducing to show that any part of the goods was actually destroyed.

The counsel for the Montjoys moved the court to instruct the jury that the value of the goods ought not to furnish any criterion to be taken into consideration in assessing damages, but the court refused to give the instructions asked, and instructed the jury that the plaintiff could not recover more than the value of the moiety of the goods.

In refusing to give the instructions asked, we think the court erred. Assuming the fact to be that the goods were actually sold by the partner, Thomas Montjoy, before the alleged trespass in breaking the house, it is impossible to perceive how the value of the goods can form any legitimate consideration in assessing damages. As partner, either of the firm might sell any part or all the goods belonging to the concern, and after a sale by either the right of property passed from the firm, and no member of it could thereafter have such an interest in the goods as to authorize the recovery of damages for the taking or detaining them by any other.

But if it be said that whether or not the goods were in fact sold by the partner Thomas Montjoy, was a question proper for the decision of the jury, and that as the instructions asked were not hypothecated on the opinion of the jury as to that fact, it was proper in the court to refuse the instructions, it is answered that if the goods were not sold, the defendant, Thomas Montjoy, must, as partner, have held an equal interest in them with the plaintiff, Holden, and cannot have been liable to the action of Holden for the taking of the goods. He might, perhaps, have been liable if the goods had been actually destroyed, but there is no evidence of any destruction, and it is well settled that unless the goods held in common be actually destroyed, an action of trespass or trover cannot be maintained by one tenant in common, joint-tenant, or partner, against another: 1 Chitty on Pleading, 156; Buller's Nisi Prius, 34, 35; 2 Saund. 47, f. g. note 1; Wat. Part. 148.

But it was contended in argument, that however true it may be that one partner cannot maintain trespass against his co-partner, any one of the partners may recover of a stranger for a trespass committed on the partnership goods, unless the

failure to unite all the firm in the action, is taken advantage of by a plea in abatement, and as there is no plea in abatement in this case, and the action is brought against Alvin Montjoy, who was no partner, it was insisted the plaintiff, Holden, is entitled to recover the moiety of the goods. It should, however, be recollected that the partner, Thomas Montjoy, is a co-defendant with Alvin Montjoy, and damages are sought to be recovered for a taking by the defendants jointly; and as from the nature of Thomas Montjoy's right and interest in the goods, no trespass can have been committed by him in taking them, the co-operation of Alvin in that taking, cannot change the character of the act from what it would have been if the taking had been by Thomas only.

Judgment reversed.

MOORE v. SKIDMORE.

[LITTELL'S SELECT CASES, 453.]

SPECIFIC PERFORMANCE, WHEN DENIED.—If the party seeking the specific execution of a contract, has been in default without excuse, chancery will not make compensation to the opposite party, and then decree a specific execution.

BILL in equity. The opinion states the case.

Hardin, for the appellant.

Crillenden, *contra*.

By Court. On the seventeenth day of October, 1809, James Skidmore and Andrew Feland entered into articles of agreement, in which Skidmore engaged to build a good overshot mill for Feland, on Pettit's Gap branch, completely finished in a good, workman-like manner, and to be made to grind equal to any other mill whatsoever, on such a stream as that is; and the mill was to be finished on the first day of December next ensuing; and if the parties could not agree on the prices, they were to abide by the judgment of James Stone and Patrick Hite. Feland was to let Skidmore have a certain tract of land on Green river, containing seventy-five acres, more or less, at the price of one hundred pounds, to be paid for in the price of the mill and other carpenter's work to be done on Feland's farm, valued by the same men, and the balance, if any, in good trade; and Feland was to make to Skidmore a good title in fee-simple for the land. Skidmore went on to do part of the labor on the mill, but did not complete it; and also some carpenter's

work on a building of Feland's, which was not completed. Feland put Skidmore into possession of the land, or allowed him to receive the rents, shortly after the contract. Feland declined his mill ultimately, and in the year 1814, sold and conveyed the land to George Moore, who had knowledge of Skidmore's contract, and who, forthwith by warrant of forcible detainer, evicted Skidmore, who then filed his bill against Moore and Feland, claiming a specific execution of his contract, and a conveyance against Moore. He charges that he complied with his part of the contract, as far as was practicable, and performed much of the labor, taking the timber from the stump, and would have finished the mill if he had been permitted by the defendant, Feland, whom he required frequently to get ready and make preparations, necessary on his part, to complete the work, and that Feland as frequently postponed it; that he waited two or three years under assurances that Feland would get ready, but he always failed; that the carpenter's work and mill, so far as he progressed was worth one hundred pounds and more. He alleges he did do all the work about it which could be done until the defendant, Feland, prepared for the erection and organization of the machinery, which Feland failed to do, until the sale to Moore. He avers, he was always and still is ready to complete the work, and that he had pressed Feland to get ready in vain.

Moore and Feland answered the bill, and contend that the failure in building the mill was on the part of the complainant, and deny the failure on the part of Feland and the readiness of the complainant, or that he did do what he could. Feland denies that he was bound by the writing to do any part, and alleges, that by the terms of the writing Skidmore was to do all. The court below decreed that Moore should convey the land; but first, to ascertain whether it was paid for, impaneled a jury to value the work done. The jury assessed the value somewhat less than one hundred pounds. This deficit was agreed to be paid to Feland before the conveyance was made. From this decree Moore and Feland have appealed to this court.

The attention of the parties has been much drawn in the preparation of this cause, to the construction of the contract; the appellee contending and attempting to prove that by their agreement, by the construction of millwrights and the custom of the country, Feland was to do the part of an employer of a millwright, such as making the dam, digging the race, furnish-

ing the timber, hauling it to the ground, and doing the stone work, digging and building, leaving the appellee to do only that part which required the skill of the millwright to perform, and the appellants contending against and disproving this construction.

In deciding this cause, we will first consider the contract according to the construction given to it by the appellee; for if he had not complied with it, when construed in his own way, he will not be entitled to relief, and there will be no necessity of deciding what its true legal construction is. There is no pretention that there was a mistake made in drawing this article, as to the date when Skidmore was to have the work completed. This matter is neither alleged in the pleadings nor obviated by proof, but it requires the work to be completed by the first day of December next ensuing the date, which allowed only forty days for the completion of the work. This seems too short a time, and the parties appear, in fact, to have turned their eyes to the ensuing year for the performance of the labor, so that it is probable that the first day of December, 1810, was intended. We will consider the contract as to this date, which is as liberal as the appellee can ask, and then inquire whether he will be entitled to any relief.

Giving all this latitude to the appellee, he has failed to prove that the appellant, Feland, failed to board him or his hands, to furnish timber or materials, or that there was either the want of dam, race, or building, before the work proceeded further, or that he had to cease work for the want of these preparations on the part of his employer, or that he urged Feland to get his part ready at any time previous to the first of December, 1810. On the contrary, it is shown in proof, that Feland hurried the preparations on his own part, that he furnished a shop for the appellee to work in, who therein did the work of others; and the proof is clear, that all the millwright work on the mill was not done, which could have been performed without further preparation and labor on the part of Feland; and, indeed, it was not until during the year 1811 or 1812, that the appellee made a show of urgency and readiness to go on with the work, by demanding of Feland to get ready and allow him to go on with the work. About this time, or afterwards, Feland declined prosecuting further the building of a mill.

It is often asserted by chancellors, that specific execution of contracts by decree, is a matter of sound discretion, and not a matter of right. Parties really entitled to redress, will not

always obtain specific relief, but will frequently be left to their remedy at law upon their contract, where they can receive compensation in damages, with proper abatement for their own defalcations. It will readily be admitted, that equity will frequently accept an offer or tender of performance made in good faith for performance itself, and that efforts to fulfill the part of the party seeking specific relief, extended as far as practicable for him to go, and he cannot go further, owing to the conduct of his adversary, will be admitted in lieu of strict performance, and thereupon, a decree specifically enforcing the stipulations, may be based.

But at the same time, this tender and these efforts must not be colorable but real; not presented out of time, but at the period prescribed in the contract; and the party relying on them ought to be held to show, that he really extended his efforts as far as he was capable of doing, until obstructed by the conduct of the opposite side. It will not do to present appearances only, without reality; to commence and not to go to the extent, and leave part within his power to be performed, incomplete. Such conduct is justly termed in equity, trifling with the contract, and the party guilty is not entitled to specific relief. A court of law, in case of dependent covenants and precedent conditions, will permit an action to lie on part performance of the plaintiff; but that court has it in its power, to prevent a compensation in damages commensurate with the counter benefit. On the contrary, specific relief in chancery, goes for the entire redress, and if the party seeking it has failed on his part, without an excuse, chancery will seldom make up to the opposite side, a compensation in damages for the defalcations of the complaining party, and compel the other side to accept it in lieu of what he ought to have had. This is virtually new modeling, and substantially altering the stipulations of the parties, which the chancellor possesses no power to do.

These principles apply emphatically to the case of the complainant in this instance, and decide the right of specific relief against him. The facts show that he had done something of some value; but not all he should or might have done, and for what he has done, he ought to be left to his action at law for an equivalent.

Decree reversed and bill dismissed, without prejudice to an action of law.

DOWNS v. QUARLES.

[LITTELL'S SELECT CASES, 489.]

MONEY PAID ON A GAMING CONSIDERATION cannot be recovered in equity on the ground merely that it was lost by gaming.

BILL in equity. The opinion states the case.

Wickliffe, for the appellant.

Crittenden, for the appellees.

By COURT. In this case the plaintiff in error filed his bill, stating that at sundry times and places, he was induced to play at cards with the defendant Quarles, until the amount won by Quarles was six hundred dollars, for which sum Quarles afterwards drew an order in favor of the other defendant, who knew the consideration was for gaming, and he accepted and paid the order. He prays a decree for the restoration of the money. The defendants demurred, and the court sustained the demurrer and dismissed the bill, to reverse which decision this writ of error is brought.

The plaintiff states that the gaming was known to the defendants only, and prays a discovery. One of the grounds relied on in the court below was, that the bill ought to have brought in the nature of a *qui tam* action. It must be at once conceded that the complainant has not brought himself within the provisions of the act entitled "An act to reduce into one the several acts to prevent unlawful gaming;" 2 Lit. 104; 1 Dig. 633; he has not brought his bill within three months from the time of gaming or payment; nor does he pretend that the money was won in twenty-four hours. But we conceive it is equally clear that the case does not come within the provisions of the act entitled "An act more effectually to suppress the practice of gambling and duelling;" 2 Lit. 484; 1 Dig. 635; for that act, we conceive, only embraces in its provisions money staked or betted, and actually exhibited or paid at the time and place of play, and not cases where persons have played upon credit, and made a gaming contract, such as this, to be performed afterwards. Such cases are left to be governed by other principles; and this case resolves itself into the simple inquiry, whether equity will direct money to be restored which has been paid on a gaming contract, to recover which the statutes afford no remedy. At common law wagers were admitted into the class of valid contracts, for the enforcement of which remedies were allowed. Anterior to any legislation on the subject, chancery

watched such engagements with a jealous eye, and would frequently lay hold of a slight circumstance to set them aside, such as the enormity of the demand from which imposition would be presumed, or that fact that the sum lost or won was beyond the estate and degree of the parties, would frequently induce the chancellor to interfere. All such decrees, however, treated these contracts as valid, and vacated them only when they were unfairly or oppressively made. Since the passage of the statutes of Virginia and this country upon the subject, all such contracts are treated as they ought to be, and are placed upon the grade of base contracts, infected with a turpitude of consideration, and are declared void. Hence equity has frequently set them aside when they were executory only, and has perpetually enjoined judgments founded upon securities given on such consideration, as in the cases of *Buckner v. Smith*, 1 Wash. 299, 389 [1 Am. Dec. 463]; 2 Hen. & M. 80; *Davidson v. Givens*, 2 Bibb, 200 [4 Am. Dec. 695]; *Clay v. Fry*, 31 Id. 248 [6 Am. Dec. 649], and the cases there cited.

We have, however, in the researches which we have made on this subject, been unable to discover any case except that of *Rawden v. Shadwell*, Amb. 269, where money, since the statutes of Great Britain declaring such contract illegal, has been decreed by the chancellor to be refunded. In that case there is a reliance placed upon the circumstances of the parties, the imprudence of the transaction and enormity of the demand. The chancellor there appears to treat it as a contract which would not have been set aside, if fair, and to have resorted to the ancient reasons for interfering. Besides, there the contract was only partially fulfilled and relief was required against the residue not performed, and the chancellor treating it as an entire thing, decreed that part which had been paid to be refunded. In these features that case differed from the present, and it is hard to extract from it a principle which would authorize a refunding in all cases. We are unwilling, from one precedent so ambiguous, to establish a rule that would permit the gamester in the hour of repentance to regain what he had improvidently and viciously lost. It is a general principle, applicable both in chancery and at law, that when two unite in making an illegal and immoral contract, neither shall have the remedy to enforce it, and if either fulfill, the other shall not recover back the money paid on such a base and illegal consideration, according to the maxim *in pari delicto potior est conditio defendentis*. It is indubitably politic and wise to give the statutes against gaming

that construction which would best suppress the mischief. But the distresses of a ruined gamester, standing as a monument of his folly, may do as much to restrain the practice, as the vexation of his copartner in guilt could, arising from his being compelled to disgorge his ill-gotten wealth. The former by his success might be encouraged to renew his excesses, while the latter would not be certainly reformed by being compelled to restore what he had gotten without consideration. Where two, therefore, in equal guilt have agreed to game, as the plaintiff and defendant appear to have done, the chancellor or court of common law, ought not to interfere between them, further than to allow the possessor of the iniquitous gains to retain what he holds and to inflict the appropriate penalties for violating the laws of society provided by the statutes themselves.

Decree affirmed.

BY THE COMMON LAW, WAGERS made in respect to matters not affecting the feelings, interest or character of third persons, or the public peace, or good morals or public policy, are valid and can be enforced. But if the wager involves a breach of the peace, or tends to a breach of the peace, or is calculated to wound the feelings or affect the interest, or character of third persons or is in relation to a matter which is *contra bonos mores*, or is against public policy, it is illegal and void, and no action in affirmance of the contract can be maintained: *Johnston v. Russell*, 37 Cal. 670; *Wheeler v. Spencer*, 15 Conn. 28; *Winchester v. Nutter*, 52 N. H. 571. The common law interpretation of betting contracts is now altered by statutes in England and in this country as well as by judicial decision in many of the states: 2 Parsons on Contracts, sec. 755, the courts inclining to regard all wagering contracts as tainted with immorality and as illegal.

ACTIONS ON WAGERS.—It is the universally accepted doctrine that no action in affirmance of an illegal wager can be maintained, but that actions which proceed upon a disaffirmance of the contract as illegal and void may be sustained while the contract remains executory. Under the English decisions, which have been followed in most of the United States the contract is considered executory until the money depending upon the result of the wager has been actually paid to the winner. In accordance with this view, where the articles wagered are placed in the hands of a stakeholder the determination of the event, does not execute the contract, and an action on the part of the loser will lie to recover what he has deposited with the stakeholder. The rule extracted from the cases is, as expressed in *Wheeler v. Spencer*, 15 Conn. 27: "That money received by a third person not a party to an illegal transaction may be recovered back before it is paid over as money had and received to the plaintiff's use, and that where an illegal wager has been laid, either party may notify the stakeholder not to pay it over to the winner, and recover back the amount of his stake, and it is wholly immaterial whether the event upon which the money was staked has or has not happened when the party chooses to recall it." This principle is approved in *Hale v. Sherwood*, 40 Conn. 332, and is adopted in the states represented by the following decisions: *Conner v. Ragland*, 15 B. Mon. 634;

Hutchings v. Stilwell, 18 Id. 776; *Stacy v. Foss*, 19 Me. 335; *House v. McKenny*, 46 Id. 94; *Perkins v. Eaton*, 3 N. H. 152; *Conklin v. Conway*, 18 Penn. St. 329; *Jacobs v. Walton*, 1 Harr. 496; *Moore v. Trippe*, 20 N. J. L. 263; *Huncke v. Francis*, 27 Id. 55; *Stuphin v. Crozer*, 30 Id. 257; *Ivey v. Phifer*, 11 Ala. 535; *Alford v. Burke*, 21 Ga. 46; *Shannon v. Baumer*, 10 Iowa, 210; *Perkins v. Hyde*, 6 Yerger, 228; *Bledsoe v. Thompson*, 6 Rich. 44; *Burroughs v. Hunt*, 13 Ind. 178; *Wilkinson v. Tousley*, 16 Minn. 299; 2 Parsons on Cont. 626.

In *Johnston v. Russell*, 37 Cal. 670, this rule is not recognized as the true rule upon the subject, in the absence of any statutory provision, and it is there held that the courts will not interfere to enable a party to recover the amount of his stake from the stake-holder after the event has settled how the bet is to be determined, and before the payment over to the winner. "No obstacle should be thrown in the way of their repentance, and if they retract before the bet has been decided, their money ought to be returned to them. But persons who allow their stakes to remain until after the bet has been decided, and the result has become generally known, are entitled to no such consideration." Per Sanderson, J., following the reasoning of *Yates v. Foot*, 12 Johns. 1. The decision in 37 Cal. 670, is in harmony with the subsequent case of *Hill v. Kidd*, 43 Id. 615.

METCALFE v. CONNER.

[LITTELL'S SELECT CASES, 497.]

CONFESSIONS OF CONSPIRATORS.—The fact of conspiracy cannot be established by the confessions of one that others had conspired with him; but when the conspiracy is proved by other evidence, the confessions of one of the conspirators will be admissible against the others.

WRIT of error. The opinion states the case.

Crittenden, for the plaintiffs.

Sharp, contra.

By Court, BOYLE, C. J. This is a writ of error prosecuted by the defendants to a judgment for the plaintiff, in an action of trespass, for an assault and battery alleged to have been committed upon the plaintiff Ann, the wife of the other plaintiff. We are of opinion that the circuit court erred in refusing to instruct the jury, at the instance of the defendants, to find for all of them, except the defendant Metcalfe. He is the only one of the defendants proved to have touched the plaintiff Ann; and against the other defendants there is no evidence conducing in the slightest degree to prove them guilty of committing any assault or battery upon her, or of any intention to do so. It is true that it was proved that the other defendants confessed that they were at the house of Conner when the assault and battery

charged is alleged to have been committed; and it was also proved that Metcalfe confessed that he and the other defendants had gone there for the purpose of taking from Conner, by force, an idiot boy whom he had in his custody. But the circumstance of the other defendants being at Conner's house, is no evidence that they were there for an unlawful purpose; nor can it, of itself, be sufficient to render them responsible for any act done by Metcalfe in which they did not participate; and the confessions of Metcalfe are certainly not legitimate evidence against the others, to prove the unlawful purpose with which they went to Conner's, and thereby to charge them with the consequences of his acts. Where several agree or conspire to commit a trespass, or for any other unlawful purpose, they will no doubt all be liable for the act of any one of them done in execution of the unlawful purpose; and when the agreement or conspiracy is first proved by other evidence, the confessions of one of them will be admissible evidence against the others.

But it is well settled that the confessions of one person cannot be admitted against others to prove that they had conspired with him for an unlawful purpose.

The judgment must, therefore, be reversed with costs, and the cause remanded, that the verdict may be set aside and a new trial had, not inconsistent with this opinion.

On the eleventh of December, the following additional opinion was delivered by BOYLE, C. J.:

In the opinion delivered in this case it is admitted, where several have agreed or conspired to commit a trespass or other unlawful act, that the confessions of one of them are evidence against the others, the agreement or conspiracy being first proved by other testimony; but, upon further reflection, we are convinced that this position, unless it be understood with great restrictions, is not correct. Any declarations by one of the party at the time of committing the unlawful act, are, no doubt, not only evidence against himself, but, as being a part of the *res gestæ*, and tending to determine the quality of the act, are also evidence against the rest of the party, who are equally as responsible as if they had themselves done the act. But what one of the party may have been heard to say at any other time, as to the share which others had in the transaction, or as to the object of the conspiracy, cannot be admitted as evidence to affect them, for it has been solemnly decided that a confession is evidence only against the person himself who makes the confession, and not against others: Phillips' Evidence, 73-4.

This explanation cannot affect the result of the former opinion, but we have thought proper to make it, lest the opinion as it stood might have misled the parties on the trial to be had in the circuit court.

HOLLEY v. HOLLEY.

[LITTELL'S SELECT CASES, 508.]

ON A PENAL BILL, an action for the sum actually due may be maintained without any reference to the penalty.

JUDICIAL NOTICE MUST BE TAKEN of the laws of a mother state which were in existence at the time of the separation from such state.

THE RATE OF INTEREST is governed by the *lex loci contractus*.

LAWS OF OTHER STATES are matters of fact to be proved, in accordance with which the rate of interest should be found. The court cannot judicially find the rate of interest of another state.

DEBT. The opinion states the case.

Crittenden, for the appellant.

Wickliffe, contra.

By COURT. This was an action of debt founded on the following note;

“Fairfax county, *act*. I, John Holley, of the state of Kentucky, in nine months after date, promise and oblige myself, my heirs, executors, etc., to pay, or cause to be paid, unto Henry S. Holley, of the county aforesaid, or to the heirs, etc., of the said Henry S. Holley, the just and full sum of five hundred and fifty dollars, current money of Virginia, it being for value received, with legal interest thereon; for the performance of which I bind myself, my heirs, etc., in the penal sum of one thousand dollars like money, as witness my hand and seal, this first day of October, in the year 1807. Signed, John Holley.”

Of this note oyer was craved and given, and the defendant below demurred, and the court below overruled that demurrer.

We discover no plausible ground for the demurrer, except that the plaintiff in his declaration has not declared for the penalty but for the sum really due, and takes no notice to the penal part, nor does he recite it in any part of his declaration. The only question then presented, is, can an action be brought for the real sum due, or must it be brought for the penalty? This is not a bond with a condition to pay a lesser sum, but a penal bill containing direct and express stipulations to pay the lesser sum, and that reasoning must be technical indeed, that would

prove that the plaintiff could not declare for this stipulated sum and waive the greater, which is inserted by way of security only, that he should not be allowed to go for the whole amount which he can recover as the law now is. Anciently, on a bond with a condition, his recovery was of the penalty only, and to be relieved from it, and to compel the plaintiff to accept less, he must go into equity. Now, by statute, the judgment itself at law, is entered to be discharged by the payment of principal and interest. But even while the rigid rule prevailed with regard to bonds with a penalty conditioned to pay a lesser sum, we have not been able to discover any case which compelled the plaintiff to go for the penalty in a penal bill. It is said that he may, on such a bill, declare for the payment of the money on a certain day with a *nomine pœnas* for the payment, and afterwards declare in the same declaration for the *nomine pœnas*: 1 Morgan's V. M. 213; Cro. Eliz. 771. This doctrine shows that he might declare for one or the other, or both, in the same declaration, and it may be considered as decisive of this question.

The next error assigned, questions the judgment of the court as to interest. A jury after the demurrer was overruled, was sworn to inquire of damages, who found one cent, and the court rendered the judgment for interest after the rate of six per cent. per annum until paid. This judgment conforms to the practice under our statutes with regard to interest on domestic notes, but ought this note or obligation to be taken as one executed in Kentucky? If it cannot, could the court give judgment for the interest as matter of law?

It is true the plaintiff alleges that this note was executed in Fairfax county, to wit, at the circuit and county aforesaid; but the note itself not only expresses the county of Fairfax, and that the plaintiff is resident there, but it also calls for current money of Virginia. Although the currency of Virginia, when named in dollars, is, by the acts of congress, the currency of every other state, yet the naming of Virginia, together with the naming of the county, seems to show that the note was executed there. We are bound judicially to know the laws of Virginia, of a general nature, which were in force at the time of the separation. Whether, however, we are bound to notice the laws of Virginia establishing a county because it is of a local nature, is a question of more doubt, and which we have not deemed it necessary now to decide, for certain it is we are bound to notice the laws of this state establishing counties, and among them all there is not one named Fairfax.

This is conclusive to show that here was not the place of the execution of the note, and raises a very strong presumption that Fairfax is in Virginia, the place named in the note. Thus we arrive at the same conclusion, of the local situation of Fairfax as matter of fact, as we might be compelled to adopt as matter of law, and we are satisfied that this must be taken as a contract executed in Fairfax county, in Virginia. The principle that the *lex loci contractus* must govern the contract itself, and, of course, that the law of that state must govern the rate of interest, as a matter of right, although the remedy is here, is too well known to admit of controversy; of course the interest due on this note must be tested by the laws of Virginia regulating that subject, in force in 1807. These laws, if adopted since the separation, must be taken as matter of fact, to be proved on the trial, and by them the jury ought to have found the rate of interest, and the court could not, judicially, fix the rate, as it has done in this instance.

It may be said that as we are bound to notice the laws of Virginia in force at the separation, and the law then regulating interest was five per cent. per annum, we ought to presume that the same law was in force until its repeal was shown, and, therefore, that we ought, in correcting this judgment, to direct it to be entered at the rate of five per cent. We have not thought it necessary to decide whether the premises are sound from which this conclusion is drawn, for admitting that we ought to presume that the same laws are now in force in Virginia which were at the separation, unless the contrary appears, yet we well know that the plaintiff below was at liberty to show that the rate of interest had been increased, and the defendant that it had been reduced to nothing since that period, or in the year 1807, and we are not told what evidence was introduced on the inquiry of damages. Where a verdict is rendered for a cent in damages on a note given here, we can easily decide that no evidence was given to increase or lessen the legal rate, because the law does not permit it; but in this case the interest might have been controlled by the proof although the presumption of five per cent. might exist. Put the case, that the defendant did destroy that presumption in this case, before the jury, and from the existence of the laws at the separation we should direct a judgment of five per cent., we should do the defendant an irreparable injury. We must, therefore, in this case, indulge a presumption in favor of the inquiry of damages, which we are bound to do in all cases where the extent in justice of

the judgment depends upon proof of facts. They must be taken to be right until the contrary appears.

It results, therefore, that this judgment ought to have been rendered for the debt and damages found by the jury. Judgment reversed and directed to be entered for the debt and one cent in damages, without any interest.

LIQUIDATED DAMAGES OR PENALTY.—See note to *Graham v. Bickham*, 1 Am. Dec. 328.

THE LAWS OF A MOTHER STATE before separation are noticed judicially: *State v. Twitty*, 11 Am. Dec. 779, and note.

THAT LAWS OF ANOTHER STATE MUST BE PROVED as facts, see note to *State v. Twitty*, *supra*.

THE SUBJECT OF INTEREST is examined in *Sellock v. French* and note, 6 Am. Dec. 185.

REED v. BULLOCK.

[LITTELL'S SELECT CASES, 510.]

TWENTY YEARS ADVERSE PEACEABLE POSSESSION is a bar to a suit in chancery to recover land, as much as it would be in an action of ejectment.

THE RIGHT ACQUIRED BY ENTRY is not a legal but an equitable right, and depends upon an executory contract with the government.

THE ENTRY IS THE INCEPTION OF THE TITLE and not the survey made upon it; therefore the expiration of the statutory time after entry will bar the right to recover.

APPEAL. The opinion states the case.

Bibb, for the appellant.

By COURT. This is an appeal taken by the defendants in chancery from a decree directing them to convey to the complainants the legal title of the land which is the subject of controversy, and to which the complainants assert their right in equity, in virtue of an entry for eight hundred acres made the thirty-first of March, 1784, in the name of William Hord and Waller Overton.

We have but little doubt that this entry is valid, and the entry under which the defendants claim, though elder than that of the complainants, is wholly unsupported by testimony. But the defendants allege and prove that they have been in the continued possession of the land in controversy, for more than twenty years before the commencement of this suit, claiming under a patent which issued prior to the time when they took

possession; and they plead and rely upon the lapse of time as a bar to the relief sought by the complainants. Whether twenty years' adverse possession is sufficient to preclude relief in a case of this sort, has been frequently the subject of discussion before this court; but no occasion has hitherto occurred in which it was thought necessary to decide the question. It presents itself, however, in this case in a shape in which we conceive a decision of it is unavoidable.

That there should be some limitation of time beyond which the title of a man in possession should not be called in question, is indisputable. To make land the subject of illimitable litigation, would render titles insecure, disturb the repose of society, and retard the progress of improvement. *Expediit rei publicæ est finis litium*, is a maxim founded, therefore, in the best reason and dictated by the soundest policy.

Courts of equity have accordingly, from their first institution, discountenanced stale claims, and have always refused their aid to those who have supinely or negligently slept upon their titles, whether there are any precise and imperative rules of limitation established by those courts, prior to the statute of James I., usually denominated the statute of limitations, is difficult to be ascertained. It is probable, indeed, that anterior to that time, each case was in that respect, as it certainly was in many others, subject to the discretion of the chancellor. For although the statute of 32 Henry VIII., which limits the time of bringing writs of right to sixty years, had long been in existence, courts of equity seem never to have adopted the limitation prescribed by that statute, as a rule of decision; and they did not do so, probably because the time prescribed by that statute was thought by the chancellor to be beyond what was reasonable to be allowed for the assertion of an equitable title. As soon, however, as the statute of limitations of James I. was made, courts of equity eagerly adopted the limitations it prescribed, and it has consequently long since become the settled rule of decisions in those courts. And as that statute has limited the time to making an entry upon land to twenty years after the right of entry accrues, subject to the exceptions contained in the statute, so courts of equity have invariably refused to sustain an equitable title, where the cause of action accrued more than twenty years before suit brought subject to the like exceptions. Courts of equity, it is true, do not suppose themselves within the letter of the statute, for in terms the statute only applies to legal remedies; but they consider themselves within

the reason and spirit of its provisions, and consequently, when acting upon legal rights, they decide in obedience to the statute, and when acting upon equitable rights, they adopt by imitation or analogy the rule of limitation which the statute prescribes. For, in the language of one of the English chancellors, "when the legislature has fixed the time at law, it would have been preposterous for equity, which by its own proper authority always maintained a limitation, to countenance laches beyond the period that law had been confined to by parliament; and, therefore, in all cases where the legal right has been barred by parliament, the equitable title to the same thing has been concluded by the same bar:" Sugd. Ven. 264.

It is upon this principle that the mortgagor is not permitted to redeem after the mortgagee has been twenty years in possession: 2 Fonb. Eq. 265; and the same principle equally applies to every case of an equitable title. Hence the rule is laid down in broad and general terms, that equity will never disturb a man who has been twenty years in possession with the legal title: 2 Eq. Cas. Abr., title, "Length of Time." This general rule is explicitly recognized by Lord Redesdale, in an able opinion in which he reviews the various cases upon this subject. "I think," says he, "the rule has been so laid down that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within twenty years. Thus, in case of redemption of a mortgage, if the mortgagee has been in possession for a great length of time, but has acknowledged the possession was as mortgagee, and therefore liable to redemption, a right of action accrues upon that acknowledgment; but if not pursued within twenty years, it is like the case at law of a promise of payment beyond the six years and *non-assumpsit infra sex annos* pleaded; and so in every case of an equitable title (not being the case of a trustee, whose possession is consistent with the title of the claimant), it must be prosecuted within twenty years after the title accrues."

But it has been contended, that the right acquired under an entry with the surveyor, is a legal right, and that a suit in chancery, as it tries the right of property and not the mere right of possession, assimilates itself to the writ of right, and should be governed by the same limitation which is prescribed for bringing a writ of right. Were it conceded, as is supposed by this argument, that the right acquired by an entry was a legal one, it would not follow, that the limitation for bringing a writ of right should govern the decision in this case, for it is settled,

that no person can maintain a writ of right but upon the possession of himself, or of his ancestor, within the time prescribed for bringing the writ, and it is not pretended, that the complainants, or either of them, or their ancestor, ever were in possession, so that if their right were a legal one, and of a character to be tried at law, the only remedy they could have, would be such as is founded upon their right of entry, which would be tolled by the adverse possession of the defendants for twenty years, and as the law, in such case, would afford no remedy, equity ought not, on the principles of analogy, to do so.

But we affirm, without hesitation, that the right acquired by virtue of an entry for land, is not a legal, but an equitable right. It may, indeed, as contrasted with an illegal right, be said to be a legal one, and so may every equitable title, but in the sense in which a legal title is contradistinguished from an equitable right, it possesses no one attribute of the former, and every one which appertains to the latter. "It affords no legal remedy, it cannot even be noticed on a trial at law, and is peculiarly and exclusively cognizable in a court of equity."

This was so ruled at the origin of the controversies of this sort, and has ever since been undeviatingly maintained by the courts of this country. What sort of a legal right, then, is that which cannot be noticed on a trial at law, and which is exclusively the subject of the jurisdiction of a court of equity? The only reason we have ever heard assigned, in support of the position that the right acquired by an entry is a legal one, is, because it was created by statute, but surely a statute may create an equitable as well as a legal right. It is not, however, strictly true, that the right was created by statute. The statute only authorized individuals to acquire the right, and created the means by which they were to do so, and the right must, therefore, necessarily be of the same nature of every other right similarly situated, acquired by an individual through any other legal means. Where the title of the commonwealth is granted by statute, the grantee, no doubt, becomes vested with the legal title. But the act of 1779, under which the right in question in this case was derived, did not, itself, pass the title of the commonwealth. It only authorized the functionaries of the government to sell its vacant land, and after certain preliminaries were performed to convey the right of the commonwealth by grant or patent to the purchaser. Until the patent issued, therefore, the contract was executory, and the right acquired by it must be essentially of the same character of every other right, ac-

quired in virtue of an executory contract for the sale of lands. Thus, when a purchaser of a land warrant had made his entry with the surveyor, he acquired an equitable title to the land described in his entry, in the same manner as he would have done if he had made a contract for the purchase from an individual who had a right to sell; and if a subsequent locator obtained an elder grant, he would hold the legal title for him who had the prior equity, just as a second purchaser from an individual with notice of a prior purchase, would do; for the prior entry, being of record, is presumptive notice to the elder patentee, and, therefore, he cannot plead that he is a purchaser without notice. This is the true ground of the jurisdiction of a court of equity, in such a case, as was held by the supreme court of the United States, in the case of *Bodley v. Tylor*, 5 Cranch, 191, and as was observed by the court in that case, in all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles.

The right, then acquired by an entry, is a mere equitable right, and like every other equitable right, must be as we have seen, barred by the lapse of time, if not prosecuted within twenty years after it has accrued. But the survey of the complainant's entry was made within less than twenty years before the commencement of this suit, and it is urged that the cause of action did not accrue until the survey was made. This would certainly be correct if the survey gave the right, but it is the entry which gives the right, and the survey has no appropriate efficacy, as has been repeatedly adjudged by this court. It is, therefore, to the date of the entry, and not to the date of the survey that the commencement of the right is constantly referred in all controversies between conflicting claims of this sort. It is true that the entry was liable to become void if the survey was not made in the time prescribed by law, but until there was a failure to make the survey the entry remained valid, and of course the right which depended upon it continued to exist. And it would be preposterous to suppose that there was a subsisting right, and that for a wrong done to that right there was no remedy. Where the suit is brought after the time allowed by law for making surveys, it is doubtless necessary to allege that the survey had been made in due time, for otherwise it would not appear that the complainant had a subsisting right. But where the suit was brought before the time of surveying expired, no such allegation was necessary to show that he had such right, for it resulted as a necessary consequence, from the

general law of the land that he had such right. It was, accordingly, the universal practice of the country to sue upon entries, without regard to the circumstance whether the entries had been surveyed or not, and where the entry had not been surveyed, there was no allegation to that effect, as may be seen by reference to the bills filed by the ablest counsel in the state in those cases where suits were brought before the time of surveying expired.

Upon the whole, therefore, we are of opinion that the lapse of time is a bar to the relief sought by the complainants in this case. An attempt is made by the evidence in the cause to show that one of them is within the saving of the statute of limitations, but they have not relied upon that matter, either in their bill or by a replication to the answer, and even if they could have availed themselves of it by making the appropriate allegations in their pleadings, which is, however, extremely doubtful, it is evident that they cannot take advantage of it by evidence only, without any allegation to apprise the defendants of the point relied on.

Decree reversed.

The subject of limitations in equity is considered in the note to *Frome v. Kenny*, *post*.

BRAMLET v. PICKETT.

[2 A. K. MARSHALL, 10.]

AMENDMENT OF DECREE.—A court of equity cannot amend a decree at a subsequent term in a matter of substance, except on a bill of review, and even clerical misprisions can only be corrected where the record furnishes the means of correction.

APPEAL from the circuit court. The opinion states the case.

By Court, BOYLE, C. J. This was a suit in chancery brought by Bramlet's heirs against Pickett's heirs, in the Bourbon circuit.

At the November term, 1817, the following entry was made: "On motion of the complainants, it is ordered that this suit be dismissed, and they pay to the defendants their costs, by them about their defense in this behalf expended, per agreement filed." At the May term following, the complainants having been directed, by an order of that term, to appear and show cause why the decree pronounced at the former term should

not be amended, by making the decree conformable in substance with the whole of the written agreement, amended the decree by directing that the complainants should deliver up to the defendants certain lands referred to in the agreement, and awarded to them a writ of *habere facias possessionem*. To thus altering the decree, the complainants excepted, and have appealed to this court.

The summary mode adopted in this case, of correcting or altering the decree, is certainly not consistent with the usage of courts of equity. After the term has expired during which a final decree has been pronounced, a bill of review is the only legitimate mode by which the same court can correct any error in the substance of its decree. Courts of law commonly do, we know, in virtue of various statutory provisions, possess the power of correcting or amending, on motion, the misprisions of their clerk after the term at which the judgment has been rendered has elapsed, provided there be in the record anything by which the correction or amendment can be made. And although there is no statutory provision of that sort in relation to courts of equity, yet we would not be misunderstood as denying that they might rightfully exercise the same power. But the alteration in this case cannot, we apprehend, be deemed to be the correction or amendment of a mere clerical misprision. It was, in fact, a total change of the substance of the decree, or rather it was pronouncing an entire new decree, except as to costs.

But admitting it to have been a mere clerical mistake that was amended, still there was nothing in the record by which the amendment could be made. As the written agreement was filed and referred to in the former decree, it may be taken as part of the record, but the agreement itself contains nothing from which it can be inferred that it was the intention of the parties that the stipulations of the agreement should be entered up as the decree of the court. On the contrary, the stipulations that the complainants would peaceably deliver possession, plainly implies that it was expected by the parties to be a voluntary act, and that coercion, by legal process, was unnecessary.

The amended decree must be reversed, with costs.

ROWAN, J., absent.

AMENDMENT OF JUDGMENT AFTER TERM.—“It was a rule at common law that a judgment could not be amended after the term in which it had been entered up.” Heath, J., in *Hardy v. Cathcart*, 1 Marsh. 180; *Usher v. Daw-*

sey, 4 Mau. & Sel. 94; Freem. on Judg., sec. 70. This rule was the result of two principles: 1. That the final judgment in every case ought to be the end of the controversy; and, 2. That the record made up by the proper officers and signed by the judges ought to be conclusive evidence of what the judgment was. Hence it was not the judgment *pronounced*, but the judgment *entered*, which the rule protected from alteration. It was soon found, however, that owing to the ignorance and carelessness of the clerical officers of the courts, their judgments were not always correctly entered in the rolls. The practical operation of the rule against amendments was, therefore, in many cases, to render permanent, not the judgments of the courts, but the errors of their clerks. "Several statutes, however, have corrected and supplied this defect in the law, and particularly the statute of Henry VI. relieves in all cases where the error has arisen from the misprision of the clerk:" Heath, J., in *Hardy v. Cathcart*, 1 Marsh. 180. The statute here referred to is 8 Hen. VI. c. 12 and 15. This statute enacted c. 12: "that the judges may amend (in affirmance of the judgments of records and processes) all which in their discretion seems to be misprision of the clerks in such records, etc., except appeals, indictments of treason or felony, and the outlawries of the same, and the substance of the names and additions left out in original writs and writs of exigent;" c. 15: "that the justices may amend at their discretion, any misprision or default made by the clerks, sheriffs, or other officers, in any records or processes depending before them, in writing a letter or syllable too much or too little, except processes, etc., of outlawries, of treason and of felony." See note to *Hardy v. Cathcart*, 1 Marsh. 180.

CLERICAL MISPRISIONS MAY BE CORRECTED.—The rule established by this statute, and by the adjudications under it, is now the settled law of England and of the United States, and in both countries mere clerical misprisions in entering judgments are subject to amendment as well after term as during term: Freem. on Judg. sec. 71. Properly speaking, this is not an exception to, or modification of, the common law rule prohibiting amendments of judgments after term. It simply gives effect to the rule. The judgment pronounced by the court is more efficiently protected from change now than it was before the statute; for, as the rule formerly was, the clerk could in effect, alter the judgment by a mistake in entering it, and the error was perpetuated in an unchangeable record, whereas now the entry may be made to conform to the judgment. The judgment entry may be amended, but the judgment itself, the final adjudication and decision of the court, upon the matter in controversy must stand until reversed or set aside. The judgment of the court cannot be corrected, except by some proper judicial proceeding, but the mistake of the clerk in entering that judgment may be corrected. The allowance of amendments is thus confined strictly to clerical misprisions: *Davies Co. Court v. Howard*, 13 Bush, 101. And generally an error of a substantial nature for which a writ of error would lie cannot be corrected after term by a mere motion in court: *Milam Co. v. Robertson*, 47 Tex. 222; *Kelly v. Keizer*, 3 A. K. Marsh. 268.

EVIDENCE NECESSARY TO AUTHORIZE AMENDMENT.—There is a diversity of adjudication upon the point as to whether evidence *aliunde*, the record is admissible to prove and correct a clerical mistake in the entry of judgment: Freem. on Judg. sec. 72. In England, the entry cannot be amended, except by matter of record: Freem. on Judg. sec. 71. And this is the rule in Alabama: *Summersett v. Summersett*, 40 Ala. 596; *Pettus v. McClannaban*, 52 Id. 55. In Georgia: *Pittman v. Lowe*, 24 Ga. 429; *Gay v. Cheney*, 58 Id.

304. In Kentucky: *Norton v. Sanders*, 7 J. J. Marsh. 12; *Stephens v. Wilson*, 14 B. Mon. 88; *Finnell v. Jones*, 7 Bush. 359. In Indiana: *Makepeace v. Lukens*, 27 Ind. 435. In Missouri: *State v. Clark*, 18 Mo. 432; *Saxton v. Smith*, 50 Id. 490; *Robertson v. Neal*, 60 Id. 579; *State v. Primm*, 61 Id. 166. In Mississippi: *Russell v. McDougall*, 3 S. & M. 234; *Moody v. Grant*, 41 Miss. 565; and in California: *Morrison v. Dapman*, 3 Cal. 255; *Branger v. Chevalier*, 9 Id. 172; *Swain v. Naglee*, 19 Id. 127; *Hegeler v. Henckell*, 27 Id. 491; *Decastro v. Richardson*, 25 Id. 49. In Missouri, the judge's docket and the clerk's minutes are deemed so far a part of the records of a cause as to be admissible for the purpose of correcting a mistake in the judgment entry: *State v. Primm*, 61 Mo. 166. In Wisconsin, the judge's personal recollection has been deemed sufficient ground for amending a judgment entry: *Wyman v. Bucklaff*, 24 Wis. 477. On the other hand, in Mississippi the notes of the judge taken upon the trial have been held inadmissible: *Burney v. Royett*, 1 How. (Miss.) 39; *Dickson v. Hoff*, 3 Id. 165; *Boon v. Boon*, 8 S. & M. 318; *Rhodes v. Sherrod*, Id. 97. In several of the states the more liberal as well as more reasonable practice is adopted of allowing any evidence to be adduced to prove that the judgment entered by the clerk is not in conformity with that pronounced by the court, which would be admissible upon the trial of any other matter of fact. This is the practice in Massachusetts: *Clark v. Lamb*, 8 Pick. 415; *Rugg v. Parker*, 7 Gray, 172. In New Hampshire: *Frink v. Frink*, 43 N. H. 18. In Maine: *Inhabitants of Limerick*, 18 Me. 183. In Connecticut: *Weed v. Weed*, 25 Conn. 337. In Ohio: *Hollister v. Judges*, 8 Ohio St. 201. In Illinois: *Forquer v. Forquer*, 19 Ill. 68. In Arkansas: *Arrington v. Courey*, 17 Ark. 100. In Iowa: *Stockdale v. Johnson*, 14 Iowa, 178. In North Carolina: *Galloway v. McKeithen*, 5 Ired. 12; *State v. King*, Id. 203. In Colorado: *Doane v. Glenn*, 1 Col. 456; and is sanctioned by the supreme court of the United States: *Matheson v. Grant*, 2 How. 263. In those courts where this practice prevails, the application for an amendment of the judgment entry is made by petition or motion, setting out the defect, and the change desired, after notice to the adverse party: Freem. on Judg. sec. 72. The motion for a correction of the judgment entry is not regarded as a pleading subject to demurrer: *Latta v. Griffith*, 57 Ind. 329.

INSTANCES OF CLERICAL MISFEIGNING, which the courts have held capable of correction at a subsequent term, are the following: Where the clerk's minutes and the judge's docket showed a judgment by default and the clerk entered up final judgment: *Robertson v. Neal*, 60 Mo. 579. Where the law entitles the prevailing party to a particular judgment, and a different judgment is entered up. Thus in an action of forcible entry and detainer where the verdict was guilty the clerk having omitted to enter judgment of restitution, it was held that the error might be corrected at another term: *Norton v. Sanders*, 7 J. J. Marsh. 12; *Robertson*, C. J., delivering the opinion said: "Wherever there is anything to amend by, a court may at a subsequent term amend so as to effectuate, but not so as to materially alter or defeat a judgment which it actually gave at a preceding term. In this case the verdict and the law show what the judgment should have been, and what the court must be presumed to have intended that it should be, and the minute book shows that the court directed the clerk to enter a judgment on the verdict, such a judgment of course as the law required." So a mistake in the amount of a judgment may be corrected: *Latta v. Griffith*, 57 Ind. 329. An omission of the names of heirs where they are disclosed in another part of the record: *Shackelford v. Fountain*, 1 Monr. 252. An omission of credits which were admitted

in the pleadings: *Long v. Gaines*, 4 Bush. 353; *Dodds v. Combs*, 3 Met. (Ky.) 28. A judgment entered against an administrator *de bonis propriis* on a note made by the intestate: *Smith v. Todd*, 3 J. J. Marsh, 299. A judgment entered against the defendants generally in an action brought against a surety on a note and the administrators of the deceased principal: *Leonard v. Collier*, 53 Ga. 387. A judgment entered in favor of a former administratrix whose letters had abated by marriage, where the record showed that the administrator *de bonis non* was the real plaintiff when the judgment was entered: *Gay v. Cheney*, 58 Ga. 304. A judgment entered against an administrator personally when it should have been against the goods of his intestate: *Atkins v. Sawyer*, 11 Am. Dec. 188, and see the note to that case.

TAYLOR v. BUCKNER.

[3 A. K. MARSHALL, 12.]

POSSESSION OF PART CLAIMING WHOLE.—One occupying adversely part of a tract, intending to take possession of the whole, and having caused a survey to be made, though having no written evidence of title, will be deemed to be in adverse possession of the whole.

SUCH POSSESSION FOR TWENTY YEARS tolls the right of entry of the adverse claimant to the whole tract.

A DEED IN FAVOR OF THE OCCUPANT subsequent to taking possession is evidence as to the extent of his claim as continued down to the time of trial.

APPEAL from circuit court. The opinion states the case.

Hardin and Littell, for the appellant.

Bibb, contra.

By Court, OWLEY, J. This is an appeal from a judgment recovered by Buckner, in an ejectment brought against him by Taylor, in the court below. On the trial in that court, Buckner, relying upon his possession, introduced evidence conducing to prove that Philip Buckner, under whom he claims, upwards of twenty years before the commencement of this action, went upon the land in contest; and having, with the aid of the county surveyor, ascertained the patent boundary of Stephens's two thousand acre survey, took possession thereof, claiming under Stephens, and that Philip Buckner and the appellee claiming under him have held the uninterrupted possession from that time until the bringing this suit, and having also introduced as evidence a copy of a decree of the circuit court of the United States for the Kentucky district, pronounced in favor of Philip Buckner in 1807, against Stephens for the land and a deed from Philip Buckner to the appellee,

bearing date in 1816, but without any deed having been executed by Stephens, on any other person on his behalf, under the decree, and without any other evidence of right from Stephens; the court were asked to instruct the jury that the possession of Buckner should be confined to his actual close, twenty years before the commencement of the ejectment; but the instructions asked were refused, and the jury instructed that if they believed Philip Buckner entered upon the land, claiming it as Stephens's, and that the possession under him has been continued down more than twenty years before this suit was brought, although Stephens may not have authorized the entry, they should find for the appellee; unless Bartlett, the patentee, under whom the appellant claims, or some person for him, within that time, entered upon the land.

In reviewing the decisions of the court below, the questions arise: 1. Upon the facts supposed in the instructions—does the possession of the appellee and Philip Buckner, under whom he claims, bar the appellant's right to recover any part of the land in contest? and if for any part; 2. How much?

That the possession constitutes a bar, we entertain no doubt. No principle is better settled, or more universally understood, than that to recover in an action of ejectment, a right of entry must be proven to be in the lessor of the plaintiff. And by the plain and emphatic language of the statute limiting the time of making entries upon land, those having rights or titles of entries, are expressly interdicted from entering after the lapse of twenty years from the accrual of their rights.

As, however, the limitation thus prevented by the statute, must have been intended by its makers to protect the possession of others, the right of entry cannot be said so to have accrued, as for the limitation time to commence running, until an actual adverse possession is taken of the land; and hence the necessity, in order to raise a bar by length of possession, of proving a continued hostile possession for twenty years.

To create a possession of that description, it is not, however, essential, as was contended in argument, for the possessor to have any written evidence of title. If he entered with such evidences of title, it might not be improper, but would certainly be advisable, for the purpose of showing more clearly the true character of his possession, to introduce them in evidence on the trial. But as the possession may be adverse, without such evidences of title, as without them there may be an ouster, either by disseisin, abatement, intrusion, or deforce-

ment; to require the production of them would, certainly, tend, in a great degree, to defeat the object of the statute.

As, in the present case, therefore, Buckner is proven to have entered upon the land, claiming under an adverse title to that asserted by the appellant, we have no doubt but that he truly gained an adverse possession also; and that, by continuing that possession for twenty years, he not only raised a bar to the appellant's rights, but, also, to the extent of the possession, gained a right of entry in himself.

And if the possession creates a bar to any extent, we have no doubt it must be so considered for the whole of the land now in contest. For, although Buckner is not proven to have had any written evidence of title when he entered upon the land, and although he may not have been invested with a regular authority from Stephens to enter, yet, as he is proven to have entered after ascertaining the boundary of Stephens, claiming under him, he must, upon the principle which has invariably governed this court, have gained the possession according to the boundary of Stephens; and as that boundary includes all of the land in contest, the court below decided correctly, upon the facts assumed, in instructing the jury to find for the appellee.

But it is, moreover, contended that the court below erred in its further refusal to instruct the jury, at the instance of the appellant, that they ought to disregard the decree of the circuit court for the Kentucky district, pronounced against Stephens in favor of Philip Buckner, and the deed from Philip to Nicholas, the appellee.

There is no doubt the decree and deed cannot have passed Stephens's title to the appellee, but although not sufficient for that purpose, we apprehend they are not altogether irrelevant to the matter in contest, and should not have been disregarded by the jury. Buckner, as we have already seen, was not bound to show a regular deduction of title from Stephens to enable him, by his length of possession, to bar Taylor's right of entry; but as he entered claiming under Stephens, the decree against Stephens and the deed from Philip Buckner were admissible for the purpose of showing, in connection with other evidence, the extent of his possession. The decree and deed, it is true, could not, from their date, tend to show the extent of possession joined previously by the entry of Philip Buckner, but, as a continuation of the possession was also necessary to be proven, they were properly left with the jury the more clearly to illus-

trate the nature and extent of the possession of Buckner when the decree was pronounced and the deed executed.

The judgment must be affirmed with costs.

ROWAN, J., did not sit in the cause.

ACTUAL POSSESSION OF PART of a tract of land for the statutory time, by actual inclosure, under a claim of the whole tract, was held to be a good bar to the recovery of the whole in *Daniel v. Ellis*, 10 Am. Dec. 707. But in *Hall v. Powell*, 8 Id. 722, it was determined that the adverse possession of a disseisor, upon which the statute of limitations will run, includes only lands actually occupied by him by inclosures and improvements. Occupation of a part of a tract under a recorded deed of the whole tract from one having no title is a disseisin of the true owner as to the entire tract, for the record gives notice of the extent of the claim: *Kennebec Purchase v. Laboree*, 11 Am. Dec. 79, and note.

THERE IS A DISTINCTION BETWEEN ENTRIES BY TRESPASSERS and by persons having color of title as to the effect of part occupancy. A mere usurper's possession extends only to the limits of his actual beneficial occupancy; nothing will be intended in his favor. But where one enters under color of title his possession will be construed to be co-extensive with his deed, patent, or other written evidence of title: *Tyler on Ejectment*, 903; *Hall v. Powell*, 8 Am. Dec. 722. The principle is thus stated by Mr. Justice Story in *Clark v. Courtney*, 5 Pet. 318: "If a mere trespasser without any claim or pretense of title, enters into land and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the latter. But in such case the possessor of the trespasser is bounded by his actual occupancy, and consequently the true owner is not disseised except as to the portion so occupied. But where a person enters into land under a deed or title, his possession is construed to be co-extensive with his deed or title, and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title. This, however, is subject to some qualification. For if the true owner be, at the same time, in possession of a part of the land, claiming title to the whole, then his seisin extends by construction of law to all the land which is not in the actual possession and occupancy, by inclosure or otherwise, of the party so claiming under a defective deed or title." The same distinction is made by Chief Justice Parsons in *Kennebec Purchase v. Springer*, 3 Am. Dec. 227.

THE EXTENT OF THE CLAIM MUST BE DEFINED by some instrument or notorious act in order to give constructive possession of an entire tract to one who is actually occupying only a part. That is to say, there must be something to notify the true owner of the extent of the hostile claim. "Otherwise," as was well said by Chief Justice Parsons, in *Kennebec Purchase v. Springer*, 3 Am. Dec. 227, "a man may be disseised without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seisin has been interrupted." The principle upon which the cases turn seems, therefore to be merely a branch of the law of notice. Actual occupancy, or *possessio pedis*, is notice only to the extent of such occupancy, where there is no other evidence of a claim to the land. But where the extent of the claim is clearly defined by a deed, patent, or other equivalent evidence, actual occupancy of part is constructive possession of the whole

tract, and is notice as to the whole, if the owner himself is not in possession of any part of the land.

"THIS IDEA OF CONSTRUCTIVE POSSESSION," says Bliss, J. in *Fugate v. Pierce*, 49 Mo. 441, "is confined to American courts, and was adopted in reference to the fact that in new countries the inclosures and improvements usually embrace only a portion of what actually belongs to the several farms. Hence, when one purchases a farm, although the title may ultimately prove defective, yet if he enter upon it in good faith and make improvements, or occupy those already made, his possession shall be construed to extend to the whole farm covered by his deed. The doctrine of constructive possession, which follows the title when there is no adverse possession, is applied to one who takes actual or corporeal adverse possession, under color of title, and he is held to be possessed of the contiguous land covered by the instrument under which he enters, and which he claims by virtue of such instrument. But such possession is never based upon a claim merely, and it has never been so held; there must be a deed purporting to convey the whole, or some proceeding or instrument, giving color and defining boundaries, as well as actual possession of a part." See, also, the American note to *Taylor v. Horde*, 2 Smith Lea. Cas. 563, 564. Therefore, a disseisor, without color of title, who cultivates a part of a tract, acquires no constructive possession beyond the extent of his actual cultivation: *Ege v. Medlar*, 82 Pa. St. 86. So, where one enters upon land without color of title, with the intention of making it a family burial ground, his adverse possession extends only to the land actually covered with graves: *Mooney v. Cooledge*, 30 Ark. 640. And the possession of one claiming under a parol gift of land, without color of title, extends only to the part actually inclosed and cultivated, as against a subsequent purchaser for value: *Hawkins v. Hudson*, 45 Ala. 482. To extend the possession beyond the actual occupancy, improvement, and cultivation, the boundaries of the land claimed must be defined by "entry, patent, or survey:" *Shearer v. Clay*, 1 Litt. 261. Possession under "a vague, unsurveyed entry," extends only to the limits of the actual inclosure: *Henderson v. Howard*, 1 A. K. Marsh. 26.

PART OCCUPANCY UNDER A DEED, or patent, gives constructive possession to the extent of such deed or patent: *Tyler on Ejectment*, 903; *Ellicott v. Pearl*, 10 Pet. 412; *Beach v. Sutton*, 5 Vt. 209; *Hall v. Fuller*, 7 Id. 100; *Crowell v. Bebee*, 10 Id. 33; *Wilson v. Williams*, 52 Miss. 487. So, where the deed purports to have been executed by an officer having lawful authority: *Finlay v. Cook*, 54 Barb. 9. Or where the person taking possession is a junior patentee, the holder of the elder patent not being in actual occupancy of the land: *Fox v. Hinton*, 4 Bibb. 559. A deed having no seal is held to be "color of title," so as to extend a part occupancy over the whole tract: *Barger v. Hobbs*, 67 Ill. 592. And so a deed from one having no title: *Brooks v. Bruyn*, 18 Ill. 539; *Prettyman v. Wilkey*, 19 Id. 241; *Kennebec Purchase v. Laboree*, 11 Am. Dec. 79, and note. And a conveyance by one actually occupying a part of the land under a patent for the entire tract carries with it his constructive possession of the whole land: *Hammond v. Ridgely*, 9 Am. Dec. 522. And where there is color of title to an entire tract, and actual occupancy of part, the part actually occupied need not be inclosed: *Ellicott v. Pearl*, 10 Pet. 412; *McCreery v. Everding*, 44 Cal. 246. But where possession is taken under a deed the boundaries in the deed define the extent of the claim, not only in favor of the party so taking possession, but also against him. Hence if by mistake he occupies land beyond the lines named in his deed the statute

will not run in his favor as to such land: *Dow v. McKenney*, 64 Me. 138. Constructive possession under mere color of title, does not extend to any part of the land actually occupied by the true owner: *Ellicott v. Pearl*, 10 Pet. 412; *Bellis v. Bellis*, 122 Mass. 414.

A SURVEY DEFINES THE EXTENT OF POSSESSION, where it is made by a public officer, at the instance of one in actual occupancy of part of the land for the purpose of ascertaining the boundaries of his claim. The rule laid down in the principal case on this point is well settled in Kentucky, and is approved in *Roberts v. Sanders*, 3 A. K. Marsh. 30; *Brooks v. Clay*, Id. 545; *Hoskins v. Cox*, 2 B. Mon. 306; *Campbell v. Thomas*, 9 Id. 82; *McLawrin v. Salmons*, 11 Id. 98; and, by the supreme court of the United States, in *Clarke v. Courtney*, 5 Pet. 318. And the same doctrine is established in other states: *McCall v. Neely*, 3 Watta, 69; *Heiser v. Riehle*, 7 Id. 35; *Criswell v. Altemus*, Id. 565; *Lawrence v. Hunter*, 9 Id. 64. And where such a survey is accompanied by the payment of taxes on the whole tract it is particularly effectual in defining the extent of the claim and in giving the true owner notice of it: *Murphy v. Springer*, 1 Grant's Cas. 73. But the effect of the survey is restricted by the declarations of the occupant that he does not claim title to all the land included in such survey: *Brown v. Edson*, 22 Vt. 357. The principle of these cases allowing one in part possession to define the extent of his possession by a survey, seems to be that the survey is a public and notorious act, well calculated to give notice to the true owner.

BRECKENRIDGE v. DUNCAN.

[3 A. K. MARSHALL, 50.]

A PATENT AMBIGUITY IN A WILL, or one leaving the testator's intention doubtful, cannot be explained by evidence *dehors* the will, but it is otherwise as to a latent ambiguity, or one in which the intention is clearly expressed, but where there is a doubt as to the object to which such intention applies.

CONSTRUCTION OF DEVISE.—A devise, to a daughter, of slaves "put in her possession" by the testator, does not include a slave hired to the husband of such daughter.

APPEAL from the circuit court. The case is stated in the opinion.

Bibb, for the appellants.

Hardin, for the appellee.

By Court, ROWAN, J. In the will of Duncan, the testator, among other clauses are the three following, viz.: 1. "To my daughter, Polly Breckenridge, I give the negroes and all the other property that I have put into her possession;" 2. "To my daughter, Eleanor Breckenridge, I give the negroes and all the property I have put into her possession;" 3. "To my daughter Sally, I give three negroes, namely, Mary Ann, Cas-

sandra, and Jerrard, all her beds and furniture that she acquired since she was of age, and her horse, saddle and bridle, and likewise all her other property that she has acquired since she has become of age."

The testator had several sons, to each of whom he devised land, but no negroes. To his daughters he gave negroes, as above, but no land. To Polly, upon her intermarriage with the complainant John, he gave a negro girl and a negro boy, together with his household furniture. To Eleanor, upon her intermarriage, he gave in like manner, three negroes and some household furniture. He had two negro fellows, viz., Sam and Jack. Jack he hired to one of his sons for several years before his death, which happened in the fall of the year 1818, at the price of eighty dollars per year. Sam he hired in like manner to John Breckenridge, the appellant, yearly, from the year 1815 till his death, at the like price of eighty dollars per year. Polly and John were intermarried in the year 1810. Sam was in the possession of the appellants upon hire, as aforesaid, at the date of the will and at the time of the testator's death. The appellants claimed Sam under the first above recited clause of the will, and exhibited their will in the court below against the appellees, the executors, to compel them to assent. The executors answered, refusing to assent. The court, upon final hearing, dismissed the bill, from which decree of dismissal an appeal was prayed and the cause brought to this court.

In the construction of a will, the intention of the testator is to be ascertained and effectuated. In that, as in every other instrument, the rules of construction are to be employed only when doubt exists. When a doubt exists as to the intention of the party, it is called, in law language, a patent ambiguity. But when the intention of the party is clearly expressed, and a doubt exists, not as to the intention, but as to the object to which the intention applies, it is, in the same language, called a latent ambiguity. The helps to be employed in the solution of the patent ambiguity, are to be collected from the face of the instrument alone in which it originated; and in this service the context, and every legitimate rule of exposition, may be enlisted and used in obedience to the maxim, "*ut res magis valeat, quam pereat*," but parol testimony, or extraneous proof of any kind, is inadmissible; not so in relation to a latent ambiguity. There, as the doubt originated not on the face but *dehors* the instrument, not as to the intentions of the party, but as to the nature or state of the facts in the country, any legitimate evi-

dence, of which the facts are susceptible from that quarter, is admissible to remove the doubt. In this case no doubt can be entertained as to the intention of the testator; it is clearly expressed: "To my daughter Polly I give, etc., the negroes that I put in her possession." To the negroes which the testator had put into the appellant Polly's possession, she is clearly entitled under this bequest in his will. But what negroes, and how many, he had put into the possession of his daughter Polly, are facts *dehors* the will, concerning which doubts are entertained. These doubts belong to the latent class, and are, as they may well be, solved by the proof in the cause, from the country. We learn from the entire will, as we might have inferred from the situation of the testator, that under the impression of an approaching dissolution, and in contemplation of that event, his mind was employed in providing for his children; they were the objects of his affection, as they were about to be of his benefaction; his mind flowed in the channels of his affection, or, to speak more emphatically, of his blood. He had two sons-in-law; neither of them were named; perhaps neither of them were thought of. Every child is thought of, named, and provided for as such. To his child Polly he gives the negroes which he had put in her possession. We learn from the proof in the cause that he had, eight years anterior to the date of the will, given to her two negroes, viz., Winny and Frazier, upon her intermarriage with the appellant John. Those negroes were given to Polly upon her marriage. Sam, the negro in contest, was five years afterward hired to John. To my daughter Polly I give the negroes, etc., that I put into her possession. To whom does the testator allude as the donee? His child, his daughter Polly. To what negroes does he allude? To those which he had given into her (Polly's) possession. Who were they? Winny and Frazier, whom he had put into her possession upon her marriage. He had never put Sam into her possession. He had never displayed any donative intention in relation to Sam. He had put Sam into the possession of John Breckenridge—of John, not of Polly; of him, not of her; in the year 1815—not in the spirit of gift, but of gain; not for an indefinite time, but for a year, at the price of eighty dollars, which process was renewed every successive year until his death. Sam is not the only slave not specifically disposed of by the testator in his will. Jack, a fellow of not less value, who was, in like manner, out upon hire, is alike without any specific notice in the will. We cannot, therefore, think that Sam was given up

by the will to the appellant. In this sentiment we are the more confirmed, from the consideration that the negroes given to Polly upon her marriage, were, at the date of the will, owing to their increase, of more value than the negroes given to either of her sisters at that time.

The decree of the court below, dismissing the bill of the appellants, must, therefore, be affirmed with costs.

EVIDENCE DEHORS THE WILL is not admissible to show that the testator intended to make a different disposition from that stated in the will: *Jackson v. Sill*, 6 Am. Dec. 363; *Rothmahler v. Myers*, Id. 613. Such evidence is admissible to control the terms of a will only in two cases, viz.: to explain a latent ambiguity, or to rebut a resulting trust: *Mann v. Mann*, 7 Id. 416.

BEARD v. CAMPBELL.

[2 A. K. MARSHALL, 125.]

FRAUDULENT PURCHASE THROUGH INNOCENT AGENT.—Where a purchaser of land acts fraudulently in making the purchase, the fact that the agent through whom the purchase is made acts *bona fide*, will not protect the transaction.

INADEQUACY OF PRICE is not *per se* a sufficient ground for setting aside a contract, but it is a circumstance entitled to great weight as evidence of undue advantage, and that the vendor did not know the value of the property.

SUPPRESSIO VERI vitiates a contract equally with *suggestio falsi*.

MAKING A PURCHASE THROUGH A THIRD PERSON, if there is no satisfactory reason for doing so, is a badge of fraud.

APPEAL from circuit court. The opinion states the case.

Hardin, for the appellant.

Littell and Pope, *contra*.

By Court, BOYLE, C. J. Col. Arthur Campbell, by his will, after making sundry devises, directed that his executor should sell a tract of land of one thousand acres, which he held near Louisville, so soon as it would bring twenty dollars an acre, on a credit of one, two, and three years; and another tract of six hundred and twenty-five acres in Tennessee, when it would bring five dollars an acre; and all his lands in Virginia not before bequeathed; and directed the money arising from thence to be applied to the payment of his debts and the legacies he had bequeathed, and the overplus to be equally divided between his four youngest daughters, after the death of his wife,

whom he allowed to receive the interest during her life. Col. Campbell having died, his will was duly admitted to record in the county court of Knox county, at the September term, 1811; and his son, Arthur L. Campbell, one of the executors named in the will, took upon himself the execution of the will, the others therein named having declined doing so. Not long after taking upon himself the execution of the will, Arthur L. Campbell laid off into lots a considerable part of the tract near Louisville, and sold the same, at different times, for a very large amount.

In this situation of the estate, Beard, who had intermarried with one of the four youngest of the testator's daughters, on the second day of May, 1816, the wife of the testator having previously departed this life, agreed to sell to William Hogan his wife's interest in the before-mentioned residuary devise, for the price of three thousand six hundred dollars; and on the sixth of the same month, he made a formal deed of conveyance thereof to Hogan, who, on the same day, conveyed the same, for the same price, to Arthur L. Campbell.

In the month of November following, Beard and wife filed this bill to set aside the sale made by Beard of his wife's interest on the ground of its having been obtained by fraud, and to compel Campbell, as executor, to sell the residue of the land devised to be sold, and to account and to pay over to them their share of the estate. The circuit court, on a final hearing, dismissed the bill, and Beard and wife have appealed to this court.

The only question necessary to be decided is, whether the sale made by Beard of his wife's interest, was obtained by fraud or not? There is no pretext for imputing fraud to Hogan. But the fact is incontestably established that he made the purchase not for himself but for Campbell. He had no wish to procure the interest for himself. The only motive for making the contract was to secure a debt due from Beard, whose indigent circumstances afforded no other resources of payment of that debt in pursuance of a previous understanding between Hogan and Campbell, the latter became bound to pay. Considering the purchase as having been made for Campbell, the transaction in relation to him assumes a very different aspect from what it would have worn in relation to Hogan, had the purchase been made by him for his own benefit. The interest sold by Beard is satisfactorily proven to be worth at least three times as much as the price he was to receive. It is true that

inadequacy of price is not *per se* a cause for setting aside a contract, but as evidence of fraud, it is always entitled to weight. And it is held, if there be such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him that will amount to fraud: Newland on Contracts, 357-9, and the authorities there cited.

It is proven that Beard was in needy circumstances, and pressed for money. Had he, therefore, known the true value of the interest he sold, it would have been iniquitous to take advantage of these circumstances, in order to obtain his interest for such an inadequate price. But it is apparent that Beard did not know the true value of the interest he sold. He was, probably, ignorant of the value of the lands devised by the testator to be sold. Of these, the tract near Louisville was by far the most valuable, and the price it would command had been greatly and unexpectedly enhanced, not only by the causes which operated in general upon the price of real estate in that town and its vicinity, but still more by the plan pursued by Campbell, of dividing and selling a part of the tract in lots, or small parcels. This sudden and unexpected enhancement of price, cannot be presumed to have been known to Beard, who resided in a remote part of Knox county, at the distance of nearly two hundred miles from Louisville. But the value of the interest sold by Beard did not depend, exclusively, upon the price which the lands devised by the testator would command. Much of its value depended upon the amount of the debts of the testator; for it was only an interest in the surplus after the debts and legacies were paid, that Beard sold. The amount of the debts Beard did not know, nor had he any opportunity of knowing; and he had a right to calculate from the reputed embarrassment of the testator, that the amount of the debts was much greater than it appears to be, from anything shown in this case. On the other hand, it is evident, that Campbell knew not only the value of the lands devised by the testator to be sold, but the amounts of the debts.

It was his duty, therefore, to have disclosed to Beard the information he possessed in relation to both, before he made the purchase, and the concealment of the true state of these facts was a manifest violation of good faith, and sufficient to vitiate the contract; for it is a settled rule in equity that *suppressio veri* as well as *suggestio falsi*, is a good ground for setting aside a

contract. But Campbell not only failed in his duty in this respect, but it is in proof that he told Beard, before he made the contract, that it was a good one for him, and advised him to make it, and it appears that Beard had, at that time, the utmost confidence in him.

To these evidences of the want of good faith on the part of Campbell, we must add the indirect means of making the purchase through the medium of a third person. This oblique method of making the purchase, for which there is no satisfactory apology given, is, in itself, calculated to awaken suspicion, and connected with the inadequacy of the price and the other features of the case, strongly evinces the unfairness of the transaction.

The decree of the circuit court must be reversed, with costs, and the cause remanded to that court that a decree may be there entered setting aside and annulling the contract; and that such other and further orders and decrees may be made, as may be sufficient to effectuate the relief sought in the bill, and shall not be inconsistent with the foregoing opinion.

ROWAN, J., was absent.

INADEQUACY OF CONSIDERATION alone is not a sufficient ground for setting aside a contract: *Whitefield v. McLeod*, 1 Am. Dec. 650. But the doctrine announced in the principal case that the inadequacy of price is a circumstance tending to show that undue advantage was taken of the vendor, or that he was ignorant of the value of the property, was approved in *Cruise v. Christopher*, 5 Dana, 181, where Marshall, J., delivering the opinion of the court, said: "It has been said that inadequacy of price alone, if it be such as to show that the vendor did not understand the bargain, or was so oppressed that he was glad to make it, knowing its inequality, will show a command over him that will amount to fraud: *Beard v. Campbell*, 2 Mar. 127; *Newland on Contracts*, 359. And it cannot be doubted that although the inadequacy be not so great as of itself to demonstrate such want of understanding, or oppression, or command, as to vitiate the contract, yet if these circumstances exist in connection with it, and are taken advantage of as the means of procuring an advantageous bargain upon a consideration palpably inadequate, the contract cannot stand." In that case there was, in addition to the circumstance of inadequacy of price, evidence of imbecility or weakness of understanding upon the part of the vendor, and special confidence reposed in the good faith of the vendee, and upon these combined grounds it was held that the contract should be set aside. That inadequacy of price, coupled with other evidences of fraud and undue influence, will vitiate a contract, is well settled: 1 *Parsons on Contracts*, 436, 437, 492.

THE EMPLOYMENT OF AN AGENT in making a purchase, where there is no apparent necessity for the services of an agent, throws suspicion on the good faith of the transaction: *Shalley v. Gore*, 5 Dana. 452, citing the principal case.

SUPPRESSIO VERI in a contract for the sale of land, as by concealing a radical defect in the title, is a fraud affording ground for rescission: *Peebles v. Stephens*, 6 Am. Dec. 660.

MORTON v. FLETCHER.

[2 A. K. MARSHALL, 137.]

A BOND GIVEN FOR THE PURCHASE OF LOTTERY TICKETS, where the lottery is unauthorized by law, is merely void; but the consideration of such a bond must be impeached by special plea.

THE ASSIGNER OF SUCH A BOND, if induced to keep it by the representations of the obligor, until recourse on the assignor is lost, can only recover on those representations and not on the bond.

WRIT of error of the circuit court. The opinion states the case.

Haggin, for the plaintiff.

By Court, OWSELY, J. This is an action of debt, brought by Morton, as assignee of David Williamson, upon an obligation given to Williamson by the appellees.

The appellees pleaded that the obligation was given in consideration of lottery tickets in a lottery of David Williamson, or scheme for the distribution of property, unauthorized by law, etc.

The appellant, Morton, replied, that before the obligations became due and payable, being ignorant of the consideration for which it was given, and having an opportunity of returning it to Williamson and obtaining satisfaction therefor, he applied to the appellees to know whether the obligation was good, and would be punctually paid, if the appellant should retain it; and avers that the appellees did then and there assure the appellant that the obligation was good, and would be punctually paid, and in faith of those assurances the appellant retained the obligation until it became payable, at which time, the said Williamson had become insolvent and unable to indemnify the appellant therefor, etc. To this replication the appellees demurred, and the appellant having joined in demurrer, judgment was rendered against the appellant in bar of his action. From that judgment he has appealed to this court.

Assuming the obligations to have been given in consideration of lottery tickets, as lotteries are interdicted by law, there is no question but the obligation is not only voidable, but absolutely void. But as the consideration for which it was given is not apparent upon the face of the obligation, it is true, it became

necessary for the appellees to impeach the obligation by special plea. Not, however, as was contended in argument, because the obligation was voidable only, but in obedience to the rules of pleading, to enable the court to decide upon its invalidity. If the obligation is void, therefore, it follows, conclusively, that the replication furnishes no sufficient answer to the plea. The subsequent assurances alleged by the replication to have been made to the appellees, if induced by a valid consideration, may have imposed upon them a liability to the appellant, but then their accountability results, not from any thing contained in the obligation, but from their promise to pay the assignee, and consequently to obtain indemnity, the appellant should resort to his action upon the assumpsit made to himself, and not an action upon the void obligation given to his assignor.

The judgment must, therefore, be affirmed, with costs.

A CONTRACT ORIGINATING IN AN UNLAWFUL TRANSACTION, as in a sale of tickets in a lottery forbidden by statute, under penalty, is void, although not expressly declared to be so, and no action will lie on such a contract: *Seidenbender v. Charles*, 8 Am. Dec. 682 and note; *Hibernia T. Corp. v. Henderson*, 11 Id. 593; *Wilson v. Spencer*, 10 Id. 491.

FRAME v. KENNY.

[2 A. K. MARSHALL, 145.]

LIMITATIONS IN EQUITY.—The statute of limitations does not in terms apply to suits in equity, but where legal relief is barred by lapse of time equity will not interfere; hence equity will not aid a stale transaction thirty-four years old.

APPEAL from the circuit court. The opinion states the case.

Talbot, for the appellant.

Bibb, for the appellee.

By Court, BOYLE, C. J. In August, 1814, Frame filed his bill against the heirs and executors of James Kenny, to obtain a conveyance or compensation in damages for two hundred acres of land, part of four hundred acres, which he alleges Kenny, in 1810, gave his obligation to convey to him. The other two hundred acres, he admits, has been satisfied by a conveyance from Colonel James Garrard, in consequence of an arrangement made by Kenny in 1794 or 1795. In the original bill he alleges the loss of the obligation, but, in amendment thereto, he sug-

gests that he has since found amongst his papers some mutilated fragments of it which he exhibits. The defendants admit no allegations of the bill material to the right of Frame, and insist upon the lapse of time as a bar to the relief sought. The circuit court dismissed the bill, and Frame has appealed to this court.

We have no doubt that the bill was properly dismissed. The lapse of time is sufficient, in itself, to preclude a recovery. The fragments of the paper exhibited by Frame contain neither the signature nor seal of Kenny, and although the parol evidence proves that the paper had once his signature annexed, it does not establish the fact that his seal was ever affixed thereto. If it were not sealed the statute of limitations would preclude any action at law from being maintained on it after the lapse of five years, and although the words of the statute apply to actions at law only, yet, as equity follows the law, a court of chancery considers itself bound by the statute, and invariably refuses its aid when, from the lapse of time, an action at law could not be maintained. But supposing the instrument to have been sealed, and that the statute consequently did not apply, still the claim is too antiquated to be sustained. The contract upon which the claim is founded is alleged to have been made about thirty-four years before the bill was filed, and between twenty-five and thirty years of that time the parties lived in the same county within a few miles of each other. During all that period, notwithstanding Frame labored under no disability, he appears to have made no demand of his right, and never brought suit until the death of Kenny. One who has thus slept upon his right cannot be entitled to the relief of a court of equity, for *vigilantibus non dormientibus jura subveniunt*. A claim which has lain dormant so long ought not to be resuscitated. Good policy requires that there should be an end of litigation; *expedit reipublice ut sit finis litium*.

Influenced by considerations of this sort, courts of equity have uniformly refused to give relief upon such stale transactions as the present.

Decree affirmed with costs.

LIMITATIONS IN EQUITY.—It is well settled, in accordance with the doctrine here laid down, that although statutes of limitations may not in terms apply to suits in equity, yet equity following the law will adopt the same periods of limitation in such suits as are prescribed for actions of an analogous nature: *Ang. on Lim.*, sec. 25; *Story Eq. Ju.*, sec. 64, a, and 529; *Wagner v. Baird*, 7 How. (U. S.) 258; *Badger v. Badger*, 2 Cliff. 137; *Mc-*

Clane v. Shepherd, 21 N. J. Eq. 76; *Ashley v. Denton*, 1 Litt. 86; *Smith v. Carney*, Id. 296; *Thomas v. White*, 3 Id. 175; *Bank of U. S. v. Dallam*, 4 Dana, 574; *Fenwick v. Macey*, 1 Id. 276; *Breckenridge v. Churchill*, 3 J. J. Marsh. 12; *Rogers v. Moore*, 9 B. Mon. 401; *Brunk v. Means*, 11 Id. 214; *Clay v. Clay*, 7 Bush. 95; *Ayer v. Stewart*, 14 Minn. 97; *Manning v. Warren*, 17 Ill. 267; *Kane Co. v. Herrington*, 50 Id. 239; *Sloan v. Graham*, 85 Id. 26; *Castner v. Walrod*, 83 Id. 171; *Neely's appeal*, 85 Pa. St. 387; *Carrol v. Green*, 92 U. S. 509; *Kane v. Bloodgood*, 11 Am. Dec. 417. In some of the states, indeed, the statute of limitations is expressly made applicable to all suits and actions. It is so in Oregon: *Anderson v. Bazter*, 4 Ora. 105; Code of Civ. Pro., sec. 378; in California: *Lord v. Morris*, 18 Cal. 484; *Boyd v. Blankman*, 29 Id. 19; *Love v. Watkins*, 40 Id. 547; in Missouri: *Kelly v. Hurt*, 61 Mo. 463; in Nevada: *White v. Sheldon*, 4 Nev. 280; and perhaps in several other states.

LIMITATIONS TO SUITS EXISTED BEFORE THE STATUTE, by the immemorial practice of equity courts; for it has always been a rule of those courts not to enforce stale demands or rights which were not diligently and vigilantly asserted. The equity doctrine upon this subject was thus stated by Lord Camden in an early case: *Smith v. Clay*, reported in a note to *Deloraine v. Browne*, 3 Bro. Ch. 640: "A court of equity which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court. Therefore, in *Fitter v. Lord Macclesfield*, Lord North said rightly, that though there was no limitation to a bill of review, yet after twenty-two years he would not reverse a decree but upon very apparent error. '*Expediit reipublicis ut sit finis litium*,' is a maxim that has prevailed in this court in all times, without the help of an act of parliament. But as the court has no legislative authority, it could not properly define the time of bar by a positive rule, to an hour, a minute, or a year; it was governed by circumstances. But as often as parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the court of chancery adopted that rule, and applied it to similar cases in equity. For when the legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation), to countenance laches beyond the period that law had been confined to by parliament. And, therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar." See, also, *Hoveden v. Lord Annesley*, 2 Sch. & Lef. 329; *Wilhelm v. Caylor*, 32 Md. 151; *Castner v. Walrod*, 83 Ill. 171. The statute, therefore, simply furnished courts of equity with a convenient and uniform measure for determining the proper periods of limitations already existing in those courts upon the prosecution of stale demands.

THE RULE IN EQUITY IS BROADER THAN THE STATUTE, for as it is a general rule existing independently of the statute and applicable to all stale demands, it not only embraces all cases within the statute where courts of law and equity have concurrent jurisdiction, but also cases of exclusive equitable cognizance, to which the statute does not and cannot extend. But equity

courts recognize and apply the measure of the statute in cases, not only of concurrent, but of exclusive jurisdiction, wherever the nature of the demand or right sought to be enforced will permit it: *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 329; Ang. on Lim. sec. 26. There is a noticeable distinction, however, in the effect given to the statute in the two classes of cases. Where there is a concurrent jurisdiction at law, courts of equity accept the statute as obligatory; but where a jurisdiction of chancery is exclusive, the statute is applied merely by way of analogy: *Wilhelm v. Caylor*, 32 Md. 151; *Breckenridge v. Churchill*, 3 J. J. Marsh. 12. In the case last cited the doctrine is thus stated by Robertson, C. J.: "The statute of limitations does not apply in *proprio jure* to suits in chancery. But as *equitas sequitur legem*, chancery has adopted the limitation at law as a general rule of decision: 1 Madd. Ch. 79, 80; *Thomas v. White*, 3 Litt. 183; *Haddix v. Davison*, 3 Mon. 41. In cases over which the chancellor has exclusive cognisance, he does not regard the limitation of analogous cases at law as conclusive and absolute, but notices the lapse of time only as evidence of the injustice or impolicy of granting relief. In such cases, therefore, time is susceptible of many explanations which would not affect the operation of the limitation in cases to which it peremptorily applies. But in those cases in which chancery and common law have concurrent jurisdiction, time is generally as efficacious and inexorable in a court of equity as it would be in a court of law."

IN CASES OF CONCURRENT JURISDICTION at law, courts of equity generally regard the statute as absolutely binding upon them. The periods prescribed by the statute are recognized in such cases as imposing a limitation upon the cause of action itself and not merely upon the court in which it may be prosecuted. Hence the limitation follows the demand wherever it may be sued. The party is not permitted to evade the legal bar "by changing his forum:" *McCrea v. Purmort*, 16 Wend. 460. The statute, therefore, operates upon such cases in the same way in equity as at law. It acts *ex suo vigore* and not by the discretion or courtesy of the court: *Farnam v. Brooks*, 9 Pick. 212. In Story Eq. Jur., sec. 529, the learned author, in speaking of the manner in which courts of equity act in such cases, says: "They do not act in cases of this sort (that is, in matters of concurrent jurisdiction) so much on the ground of analogy to the statute of limitations as positively in obedience to such statute: *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629, 630, 631; *Spring v. Gray*, 5 Mason, 527, 528; *Sherwood v. Sutton*, Id. 143, 146." It is perfectly well settled, in accordance with the principles here stated, that where there is a concurrent jurisdiction in equity and at law, or where a legal right or demand is sought to be enforced in chancery, the bar of the statute is as absolute, peremptory, and inexorable in the one court as in the other: *Stamford v. Tuttle*, 4 Vt. 82; *Collard v. Tuttle*, Id. 491; *Hall v. Hall*, 8 Id. 150; *Tharp v. Tharp*, 15 Id. 105; *Lansing v. Starr*, 2 Johns. Ch. 150; *Roosevelt v. Mark*, 6 Id. 266; *Kane v. Bloodgood*, 11 Am. Dec. 417; *Atwater v. Fowler*, 1 Edw. Ch. 417; *McCrea v. Purmort*, 16 Wend. 460; *Humbert v. Trinity Church*, 24 Id. 587; *Bruen v. Hone*, 2 Barb. 586; *Rundle v. Allison*, 34 N. Y. 180; *Wanamaker v. Van Buskirk*, 1 N. J. Eq. 685; *Conover v. Conover*, Id. 403; *McClane v. Shepherd*, 21 Id. 76; *Watkins v. Harwood*, 2 Gill & J. 307; *Lingan v. Henderson*, 1 Bland. Ch. 236; *Young v. Mackall*, 3 Md. Ch. 398; *Knight v. Brawner*, 14 Md. 1; *Wilhelm v. Caylor*, 32 Id. 151; *Van Rhyn v. Vincent*, 1 McCord Ch. 310; *Cumming v. Berry*, 1 Rich. Eq. 114; *Moore v. Porcher*, 1 Bailey Eq. 195; *Johnson v. Johnson*, 5 Ala. 90; *Wood v. Wood*, 3 Id. 756; *Gunn v. Brantley*, 21 Id. 633; *Crocker v. Clements*, 23 Id. 296; *Phares v. Walters*, 6 Iowa, 106; *Armstrong v. Campbell*, 3 Yerg. 201; *Faulkner v.*

Thompson, 14 Ark. 479; *Wilson v. Anthony*, 19 Id. 16; *Borden v. Peay*, 20 Id. 293; *Phalen v. Clark*, 19 Conn. 421; *Manning v. Warren*, 17 Ill. 267; *Harris v. Mills*, 28 Id. 44; *Kane Co. v. Herrington*, 50 Id. 239; *Sloan v. Graham*, 85 Id. 26; *Mandeville v. Lane*, 28 Miss. 312; *Mitchell v. Woodson*, 37 Id. 567; *Taylor v. McMurray*, 5 Jones Eq. 357; *Hamilton v. Hamilton*, 18 Pa. St. 20; *Neely's appeal*, 85 Id. 387; *Manchester v. Mathewson*, 3 R. I. 237; *Munson v. Hollowell*, 26 Tex. 475; *Perkins v. Cartnell*, 4 Harr. (Del.) 270; *Keaton v. McGivier*, 24 Ga. 217; *Steele v. Moxley*, 9 Dana, 137; *Field v. Wilson*, 6 B. Mon. 479; *Clay v. Clay*, 7 Bush, 95; *Bank of U. S. v. Daniel*, 12 Pet. 32; *Wagner v. Baird*, 7 How. (U. S.) 258; *Carrol v. Green*, 92 U. S. 509; *Badger v. Badger*, 2 Cliff. 137.

IN CASES OF EXCLUSIVE EQUITABLE COGNIZANCE, the rule of the statute does not operate of its own force, but is applied by way of analogy to suits resembling particular classes of actions, in the nature of the subject-matter or of the relief sought. If no such analogy exists, the equity courts simply apply their ancient doctrine, that stale demands are not to be favored. The rule pertaining to this class of cases is thus stated in Story Eq. Jur. sec. 529. "But where the demand is not of a legal nature, but is purely equitable, or where the bar of the statute is inapplicable, courts of equity have another rule, founded sometimes upon the analogies of the law, where such analogy exists, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches and negligence: *Sherman v. Sherman*, 2 Vern. 276, S. C. 1 Eq. Ab. 12; *Bridges v. Mitchell*, Bunb. 217, S. C. Gilb. Eq. 217; *Foster v. Hodgson*, 19 Ves. 180, 184; *Sturt v. Mellish*, 2 Atk. 610; *Pomfret v. Lord Winsor*, 2 Ves. 472, 476, 477; *Bond v. Hopkins*, 1 Sch. & Lef. 628; *Smith v. Clay*, Amb. 647; 3 Bro. Ch. 640, note; *Stackhouse v. Barnston*, 10 Ves. 466, 467; *Mooers v. White*, 6 Johns. Ch. 360; *Rayner v. Pearsall*, 3 Id. 578; *Lewis v. Baird*, 3 McLean, 83; *Creath v. Sims*, 5 How. U. S. 192; *Ray v. Bogart*, 2 Johns. Cas. 432; *Ellison v. Moffat*, 1 Johns. Ch. 46; *Sherwood v. Sutton*, 5 Mason, 143, 146; *Robinson v. Hook*, 4 Id. 139, 150, 152; *Piatt v. Vaetier*, 9 Pet. 405; *Willison v. Watkins*, 3 Id. 44; *Miller v. McIntire*, 6 Id. 61, 66; 1 Fonb. Eq. B. 1 Ch. 4 sec. 27, and notes; *Brownell v. Brownell*, 2 Bro. Ch. 62."

APPLYING STATUTE TO ANALOGOUS CASES.—Equity adopts the rule of the statute in cases of an equitable nature which are analogous to any of the classes of actions mentioned in the statute. Thus in cases relating to real property, it is held, that a suit to establish an equitable title will be barred by the limitation prescribed in the statute for actions to recover such property: *Wilson v. Bodley*, 2 Litt. 55; *Hinton v. Fox*, 3 Id. 380; *Shepherd v. Young*, 1 T. B. Mon. 205; *Briscoe v. Prewet*, 4 Bibb, 369; *Rogers v. Moore*, 9 B. Mon. 401; *Lewis v. Marshall*, 5 Pet. 469; *Miller v. McIntire*, 6 Id. 61; *Reed v. Bullock*, ante, 345. So in *Hall v. Denckla*, 28 Ark. 506, it was held, that a suit to foreclose a mortgage was barred in seven years in analogy to an action of ejectment. But in Oregon, it has been determined that a foreclosure suit is not a "suit for the determination of any right or claim to, or interest in real property," within the meaning of the statute of limitations, and that, therefore, such a suit is not governed by the provision limiting actions to recover real property to twenty years, but by the provision limiting actions to recover on sealed contracts to ten years: *Anderson v. Baxter*, 4 Ore. 105. In West Virginia, it has been decided that the limitation of suits on mortgages and deeds of trust to twenty years is not in analogy to the rule relating to actions of ejectment in the statute of limitations, but is founded on the presumption of pay.

ment, and that, therefore, under special circumstances, this limit may be extended: *Pützer v. Burns*, 7 W. Va. 63. By analogy, also, the rule governing mortgages has been held to apply to equitable mortgages: *Green v. Mizelle*, 54 Miss. 220. A suit for the specific performance of a contract has been held to be within the limitation of actions for damages for the breach of contracts: *Smith v. Carpenter*, 1 Litt. 295. In *Union Bank v. Stafford*, 12 How. (U. S.) 327, it was decided that a suit to enforce a mortgage of slaves, was not governed by the limitation of actions of detinue and trover. Other decisions illustrative of the rule as to analogous cases in equity, are: *Thomas v. Brockenborough*, 10 Wheat. 146; *Elmendorf v. Taylor*, Id. 152; *Nimmo v. Taylor*, 21 Ala. 682; *Bank of U. S. v. Dallman*, 4 Dana. 574; *Ashley v. Denton*, 1 Litt. 86; *Bruen v. Hone*, 2 Barb. 586; *Hill v. Boyland*, 40 Miss. 618; *Harrison v. Harrison*, 1 Call, 419; *Hickman v. Stout*, 2 Leigh, 6; *Shields v. Anderson*, 3 Id. 729; *Cresap v. McLean*, 5 Id. 381; *Oakland v. Carpentier*, 13 Cal. 540; *Leggett v. Coffin*, 5 Jones' Eq. 382; *Goff v. Robbins*, 33 Miss. 153.

WHERE THE STATUTE FURNISHES NO ANALOGY by which courts of equity may be guided, they will interpose a bar of their own against stale demands, in accordance with the ancient practice of chancery: *Ayer v. Stewart*, 14 Minn. 97; *Holmes' appeal*, 79 Pa. St. 279; *Landrum v. Union Bank*, 63 Mo. 46; *Hudson v. Jurnigan*, 39 Tex. 579. And even where the statute bar might be held to apply, courts of equity will sometimes refuse to enforce a demand or right, on account of laches in its prosecution, where less than the statutory time has elapsed: *Bettis v. Allen*, 10 Bush, 40; *Evans' appeal*, 81 Pa. St. 278; *Castner v. Walrod*, 83 Ill. 171. But the right must be doubtful, or there must be some inequitable circumstance connected with it to deprive the party of the benefit of the full statutory period: *Davis v. Fox*, 59 Mo. 125; *Kelly v. Hurt*, 61 Id. 463. Laches, which is regarded in equity as a bar without the aid of the statute, is not subject to any fixed rules: *Landrum v. Union Bank*, 63 Mo. 48. Mere delay in bringing suit is not always laches. Thus laches is not imputable to one in peaceable possession of a tract of land, for delay in having a mistake corrected in the description of its boundaries in a deed through which he claims: *Mills v. Lockwood*, 42 Ill. 112; *Wilson v. Byers*, 77 Id. 76.

EXCEPTIONS TO LIMITATIONS IN EQUITY.—Although equity follows the law in the limitations prescribed for the bringing of actions, yet it is said to admit more exceptions than are admitted at law: *Lansdale v. Brashear*, 3 T. B. Mon. 331; *Long v. White*, 5 J. J. Marsh, 226. Indeed, the rule of limitations does not seem to be so inflexible in courts of equity as in those of law. It is said in Story Eq. Jur., sec. 64 a: "And yet there are cases in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and on the other hand, there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief: *Pickering v. Lord Stamford*, 2 Ves. jun., 279; Id. 582; 2 Madd. Ch. Pr. 244 to 247; Mitf. Eq. Pl. 269 to 274; Blanchard on Lim. 61, 81, 82, 83; 1 Fonb. Eq. B 1, ch. 4, sec. 27, note q; *Stackhouse v. Barneton*, 10 Ves, 466; *Bond v. Hopkins*, 1 Sch. & Lef. 413; 1 Fonb. Eq., B. 1, ch. 1, sec. 3, note g; *Couper v. Couper*, 2 P. Wms. 753. But all these cases stand on special circumstances, which courts of equity can take notice of when courts of law may be bound by the positive bar of the statutes."

SUBSISTING, DIRECT AND ACKNOWLEDGED TRUSTS, cognizable only in equity are not subject to the limitations prescribed in the statute as between the trustees and the *cestuis qui trust*: *Kane v. Bloodgood*, 11 Am. Dec. 417;

Love v. Watkins, 40 Cal. 547; *Hearst v. Pujol*, 44 Id. 230; *Decouche v. Savetier*, 8 Am. Dec. 578; *Jones v. Person*, 2 Hawks, 269; *State v. McGowen*, 2 Ired. Eq. 9; *Armstrong v. Campbell*, 3 Yerg. 201; *Haynie v. Hall*, 5 Humph. 290; *Pugh v. Bell*, 1 J. J. Marsh. 399; *Thomas v. Floyd*, 3 Litt. 177; *Lexington etc. v. Page*, 17 B. Mon. 412; *Piatt v. Oliver*, 2 McLean, 267; S. C., 3 How. (U. S.) 333; *Mauzy v. Mason*, 8 Port. 211; *Wood v. Wood*, 3 Ala. 756; *Redwood v. Reddick*, 4 Munt. 222; *Wilmerding v. Russ*, 33 Conn. 67; *Simms v. Smith*, 11 Ga. 195; *Mason v. Mason*, 33 Id. 435; *Cunningham v. McKindley*, 22 Ind. 149; *Cook v. Williams*, 1 Green. Ch. (N. J.) 209; *McClane v. Shepherd*, 21 N. J. Eq. 76; *Prevost v. Gratz*, 6 Wheat. 481; *Seymour v. Freer*, 8 Wall. 202; *Evarts v. Nason*, 11 Vt. 122; *Bigelow v. Catlin*, 50 Id. 408; *Lyon v. Marclay*, 1 Watts, 271; *White v. Tucker*, 52 Miss. 145. The leading American case on this subject is *Kane v. Bloodgood*, 11 Am. Dec. 417. In that case Chancellor Kent defines with his accustomed accuracy the trusts which are to be regarded as exempt from the operation of the limitations prescribed by statute. He says: "The trusts intended by the courts of equity, not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of this court." The rule thus laid down is supported by an overwhelming array of authority: *Love v. Watkins*, 40 Cal. 547; *Carter v. Bennett*, 6 Fla. 214; *Mauzy v. Mason*, 8 Port. 211; *McDonald v. Sims*, 3 Ga. 383; *Thomas v. Brinsfield*, 7 Id. 154; *Lyon v. Marclay*, 1 Watts, 271; *Finney v. Cochran*, 1 Watts & S. 112; *Zacharias v. Zacharias*, 23 Pa. St. 452; *Raymond v. Simonson*, 4 Blackf. 77; *Lexington etc. R. R. Co. v. Bridges*, 7 B. Mon. 556; *White v. White*, 1 Md. Ch. 53; *Johnson v. Smith*, 27 Mo. 591; *Prewett v. Buckingham*, 28 Miss. 92; *Presley v. Davis*, 7 Rich. Eq. (S. C.) 105; *Tinnen v. Mebane*, 10 Texas, 246; *Governor v. Woodworth*, 63 Ill. 254; *Hayward v. Gunn*, 82 Id. 385.

Three things are necessary to constitute a trust which will not be subject to the bar of the statute: "It must be: 1. A direct trust; 2. It must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, 3. The question must arise between the trustee and the *cestui que trust*." Ang. on Lim. sec. 166; *Governor v. Woodworth*, 63 Ill. 254; *Hayward v. Gunn*, 82 Id. 385. It was held in *Blount v. Robeson*, 3 Jones Eq. 73, that any trust arising out of a confidential relation between the parties whether such relation was created by the act or operation of law or the agreement of the parties. Against a trust of this class the statute begins to run only from the time that the trust is repudiated or disclaimed by the trustee: *Seymour v. Freer*, 8 Wall. 202; *Poe v. Domic*, 54 Mo. 119; *Hearst v. Pujol*, 44 Cal. 230; *Merriam v. Hassam*, 14 Allen, 516; *Jones v. McDermott*, 114 Mass. 400; *Nease v. Capehart*, 8 W. Va. 95. The reason is obvious. So long as the trustee acknowledges the trust and holds under it, his possession is that of his *cestui que trust*, and of course the continuance of that possession cannot run against the beneficiary. The principle is thus stated by Lord Redesdale in the great case of *Hoveden v. Lord Amresley*, 2 Sch. & Lef. 307: "If a trustee is in possession and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title." The subject of trusts which are exempt from the limitations of the statute is very fully examined in *Kane v. Bloodgood*, 11 Am. Dec. 417.

BAXTER v. GRAVES.

[2 A. K. MARSHALL, 152.]

NOTICE OF PROTEST of a bill of exchange, for non-payment, must be given to the drawer, unless he has no funds in the hands of the drawee; and it will be presumed that he had funds in the drawee's hands, unless the contrary is shown by the holder.

WRIT of error to the circuit court. The opinion states the case.

Hardin, for the plaintiff.

Wickliffe, *contra*.

By Court, OWSLEY, J. This was an action of assumpsit brought by Graves to recover the amount of a protested bill of exchange, drawn by Baxter, in his favor, on a certain David B. Hill, and which was protested for non-payment. In the progress of the trial, after the bill regularly protested was given in evidence, the counsel of Baxter moved the court to instruct the jury that notice of the protest should have been given to Baxter in reasonable time after it was made; but the court overruled the motion, and instructed the jury that no such notice was necessary to enable Graves to maintain his action, unless Baxter, the drawer of the bill, had funds in the hands of Hill, the drawee, at the date of the protest. A verdict was consequently obtained by Graves, and a judgment rendered against Baxter; to reverse which, this writ of error, with *supersedeas*, has been prosecuted.

That the court was correct in supposing that no notice is necessary to charge the drawer of a bill when he has no funds in the hands of the drawee, there can be no doubt; but it is equally clear that, if the drawee has funds, and the bill is protested either for non-acceptance or non-payment, no action can be maintained against the drawer, unless he is notified of the protest in reasonable time.

Whether, therefore, in an action against the drawer, notice to him of the protest should be proven, turns exclusively upon the question, whether or not the drawee has funds of the drawer in his hands. But as the law presumes the maker of a bill always has funds in the drawee's hands, and consequently may sustain damages by the holder's neglect to give notice; in excuse for the failure to give notice, the holder of the bill should prove that the person insisting on the want of it, sustained no damage.

In the present case, however, there appears to have been no evidence introduced before the jury, conducing, in the slightest manner, to prove the drawer of the bill had no effects in the hands of Hill, the drawee, or tending to the establishment of any facts from which an inference can be drawn of Baxter having sustained no damage. In the absence of such evidence, therefore, the court should have instructed the jury that notice of the protest should have been given to Baxter; and, consequently, for its refusal to do so, the judgment must be reversed, with costs, the cause remanded, and further proceedings had, not inconsistent with this opinion.

IF THE DRAWER HAS FUNDS in the drawee's hands, or has any reasonable expectation that the bill will be honored, he is entitled to have demand seasonably made, and notice of dishonor duly given: *Robinson v. Ames*, 11 Am. Dec. 259. If he has funds in the drawee's hands at the date of the bill, but draws them out before it becomes due, he is still entitled to demand and notice, unless he knew that the funds were exhausted, or drew them out for the purpose of defeating the bill: *Edwards v. Moses*, 10 Am. Dec. 615.

AND A DRAWER HAVING NO FUNDS in the hands of the drawee is nevertheless entitled to notice if he has reasonable ground to expect the bill to be honored, as where the drawee has given him written authority to draw: *Austin v. Rodman*, 9 Am. Dec. 630.

THE BURDEN OF PROOF IS ON THE HOLDER to show that the drawer had no funds in the drawee's hands, in order to excuse want of demand and notice. The doctrine of the principal case on this point is approved, and its authority followed in *Clarke v. Castleman*, 1 J. J. Marsh. 69, and *Golladay v. Bank of the Union*, 2 Head, 57. The same doctrine is announced in *Ford v. McClung*, 5 W. Va. 156, and *Pons v. Kelly*, 2 Am. Dec. 617. And this is laid down as established law in Daniel on Neg. Inst., sec. 1084, and 2 Parsons on Notes and Bills, 550, 551. It is held, however, in *Pons v. Kelly*, 2 Am. Dec. 617, that where the drawee has accepted the bill, the drawer is entitled to have due demand made and notice given whether he has funds in the drawee's hands or not. The authorities on this point, however, are contradictory. See note to *Pons v. Kelly*, 2 Am. Dec. 619.

GAINS v. GAINS.

[3 A. K. MARSHALL, 190.]

REVOCATION PREVENTED BY DEVISEE.—An intention to revoke a will, unaccompanied by any of the acts of revocation mentioned in the statute, will not amount to a revocation, even if such acts be prevented by the fraud or force of the devisee, although such devisee may be considered in equity as the trustee of the parties, who would have been entitled if the will had been revoked.

CONSTRUCTION OF A STATUTE is admissible only where there is ambiguity

Writ of error to the county court. The opinion states the case.

By Court, BOYLE, C. J. This is a writ of error to an order of Woodford county court, admitting to record an instrument or writing, purporting to be the last will and testament of William Gains, deceased.

That the instrument in question was duly made and published as the last will of the testator, cannot admit of controversy. The subscribing witnesses, of whom there were four, clearly prove that the testator was of full age and of sound mind; that he signed the instrument by making his mark, and acknowledged it to be his last will and testament; and that they attested it by subscribing their names thereto in his presence. The requisites of the act concerning wills, were, therefore, fully complied with, and the will must be deemed valid, unless by some subsequent act or event it has been revoked or annulled. This cannot be pretended to have been expressly done; but it is urged, that the testator intended to have destroyed his will, and that he was forcibly prevented from doing so by the defendant in error, one of the devisees in the will; and hence it is insisted, that the will, though not expressly, was thereby virtually revoked.

The testimony in relation to this point shows, that some few days before the testator's death, he declared himself dissatisfied with what he had done, and expressed a wish to destroy the will; that the will was sent for and brought from the house of a neighbor, to whom it had been given for safe keeping; that it was handed to the testator, who returned it immediately to the person who had presented it, telling him to take it back to the neighbor who before had it for safe keeping; that the person to whom the testator thus returned the will, went out of the house, and after a short time was told that the testator wanted the will; that he returned into the house, and when in the act of reaching the will towards the testator, it was snatched from his hand by the defendant in error, and forcibly retained by him.

Whether, if the testator had again gotten the will into his hands, he would have attempted to do any act which would have amounted to a revocation or destruction of it, is by no means certain. It is apparent, however, from the testimony of the witnesses, that his mind was so impaired at that time by the ravages of the disorder under which he labored as to render him

utterly incapable of acting efficiently for that purpose. But admitting the competency of the testator, at the time, to have revoked his will, and that he was prevented from doing so by the conduct of the defendant in error, we should still think that the will was not thereby revoked.

The act concerning wills, after having prescribed the manner in which a will shall be made, provides "that no devise so made, or any clause thereof, shall be revocable but by the testator's or testatrix's destroying, canceling, or obliterating the same, or causing it to be done in his or her presence, or by a subsequent will, codicil, or declaration in writing made as aforesaid." None of these acts were done, and we cannot, under any circumstances, substitute the intention to do the act itself. Construction is admissible only where there is an ambiguity, and there is no ambiguity in the provision referred to. To substitute the intention to do the act, instead of the act itself, without which the statute expressly declares the will shall not be revocable, would be changing the law, not expounding it.

A devisee who by fraud or force prevents the revocation of a will, may, in a court of equity, be considered a trustee for those who would be entitled to the estate, in case it were revoked; but the question cannot, with propriety, be made in a case of this kind, where the application is to admit the will to record.

The decree of the county court must be affirmed with costs.

REVOCATION OF A WILL.—Upon the question of what will constitute a revocation of a will, or of a particular devise contained therein, see *Lawson v. Morrison*, 1 Am. Dec. 238; *Pringle v. McPherson*, 3 Id. 713; *Minuse v. Cox*, 9 Id. 313; *Johnson v. Brailsford*, 10 Id. 601.

THERE MUST BE A REVOKING ACT, as well as an intention to revoke, in order to constitute an effectual revocation. The act and intent must concur, and neither is sufficient without the other. This is the doctrine of the English as well as of most of the American courts: 1 Redf. on Wills, 306, 317, 318-320. "It seems to be necessary," says Judge Redfield, "according to the great majority of the American cases, that the act of revocation required by the statute should be performed by the testator to some extent in order to constitute a valid revocation:" 1 Redf. on Wills, 318. The rule on this subject is stated with great clearness by Woodworth, J., in *Dan v. Brown*, 4 Cow. 483. He says: "The act of canceling is in itself equivocal, and will be governed by the intent. The rule is, that if the testator lets the will stand until he dies, it is his will; if he does not suffer it to do so, it is not his will. It is ambulatory until his death: 4 Burr. 2514. There must be a canceling *animo revocandi*. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation. The statute has prescribed four. If any of them are performed in the slightest manner, joined with a declared intent to revoke, it will be an effectual revocation." The doctrine thus laid down is a restatement in almost the same language of

that announced by all the judges in *Bibb v. Thomas*, 2 W. Bl. 1043. The following cases are to the same effect: *Reed v. Harris*, 6 Ad. & El. 209; *Jackson v. Betts*, 9 Cow. 208; *Delafeld v. Parish*, 25 N. Y. 9; *Runkle v. Gates*, 11 Ind. 95; *Means v. Moore*, 3 McCord, 282; *Mundy v. Mundy*, 15 J. Eq. 290; *Blanchard v. Blanchard*, 32 Vt. 62; see, also, *Steele v. Price*, 5 B. Mon. 58.

THE WILL ITSELF MUST BE MUTILATED or defaced to some extent by the revoking act in order to render the revocation valid. The statutes requiring burning, etc., to revoke a will without executing another testamentary paper, are designed to prevent the frauds and perjuries to which the allowance of parol revocations would give rise. The policy of these statutes is that no revocation shall be proved entirely by parol. Hence, where there is no written revocation, the will itself, if not entirely destroyed, should furnish some evidence that it has been annulled. The revoking act must affect the identity and integrity of the instrument. Hence, where a testator threw his will in the fire, but a bystander snatched it from the flames after the envelope in which it was inclosed had been slightly burned but before the will had suffered any injury, it was held to be no revocation: *Reed v. Harris*, 6 Ad. & El. 209. Coleridge, J., in that case said: "The kind of construction which has been insisted upon would lead to a repeal of the statute on this subject, step by step. The statute, for wise purposes, does not leave the fact of cancellation to depend on mere intent, but requires definite acts. In the making of a will, if the proper signatures were not affixed, no explanation of the want of signatures could be received; and so, when a will has been made, to revoke it, there must be some act coupled with the intention of revoking, to bring the case within the sixth section. The question is put whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say, but there must be such an injury with intent to revoke as destroys the entirety of the will, because it may then be said that the instrument no longer exists as it was. Here the fire never touched the will. It can only be said that the testator's intention to cancel was defeated by the fraud of another party. But, to instance another case under the same clause of the statute, suppose the testator had written his revocation, and that by the act of some other party he had been prevented from signing, or the witnesses had been prevented from attesting it, could it be said that the testator had done all that lay in him, and that therefore the act of revocation was complete? We must proceed on such a view of this statute as accords with common sense." But a very slight injury to the will itself, if done by the testator or in his presence and by his direction, *animo revocandi*, will suffice. Thus in *Bibb v. Thomas*, 2 W. Bl. 1043, the will was thrown on the fire and fell off after being slightly "singed," and it was held a good revocation, though this was doubted by Chief Justice Denman in *Reed v. Harris*, 6 Ad. & El. 209. And in *White v. Casten*, 1 Jones (N. C.) 197, the paper on which the will was written was burned through in one or two places although the writing was not rendered illegible in any part, and it was determined to be an effectual revocation. Chief Justice Nash, in delivering the opinion, thus stated the rule: "There must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol appearing on the script itself so that it may not rest upon mere parol testimony." So, interlining and erasing portions of a will and tearing off the seals, have been held to constitute sufficient acts of revocation: *Johnson v. Brailsford*, 10 Am. Dec. 601.

THE DESTRUCTION OF A PAPER SUBSTITUTED for the will by the fraud of others, even though the testator believes and dies in the belief that it was the

will that was destroyed, will not amount to a revocation. It was held otherwise in *Pryor v. Coggin*, 17 Ga. 444, where the testator being an old man and nearly blind, called for his will for the purpose of destroying it, and his devisee handed him an old letter, which he threw into the fire, thinking it to be the will, and the court were of opinion that this was evidence of a revocation. In *Smiley v. Gambill*, 2 Head, 164, a similar fraud was practiced upon the testator, and the court held the destruction of the fraudulently substituted paper, *animo revocandi*, was a sufficient act of revocation. It is to be noted, however, that in this latter case the doctrine was put upon the ground that at common law a parol revocation was good, and that the statute of 29 Car. 2, providing for revocation by burning, etc., never having been adopted in Tennessee, the common law rule prevailed. The correct doctrine under the statute of Car. 2, is as already stated, that the destruction of another paper, which has been substituted for the will by fraud, will not constitute a revocation: *Hise v. Fincher*, 10 Ired. 139; *Boyd v. Cook*, 3 Leigh, 32; *Malone v. Hobbs*, 1 Rob. (Va.) 346; *Clingan v. Mitcheltree*, 31 Pa. St. 27; *Kent v. Mahaffey*, 10 Ohio St. 204. In the case last cited, Peck, J. reviews the authorities with great care, and shows the unsoundness of *Pryor v. Coggin*, 17 Ga. 444. He says: "It would be to but little purpose to prescribe formalities for the making and authentication of wills, if persons interested in setting the same aside were permitted to do so by parol proof of an intention to revoke, which was frustrated by the force or fraud of a third person. In thus seeking to prevent alleged frauds upon the testator, through the covinous acts of the devisee, or other person, we should be opening the door which the statute, for substantial reasons, has endeavored to close. '*Devisavit vel non*, seems like *revocavit vel non*.' Blackstone, J., 3 Wils. 497. And with equal propriety we might hold that an intended will, which the testator was prevented from executing by the force or fraud of parties interested, should be established as against the heir at law, and yet no one pretends that this could be done. Courts have gone a great way, when we consider the objects and purposes of the statute, in holding that a partial injury to, or destruction of the will, if apparent upon the paper itself, amounts in law to a revocation of the entire instrument, but they have very properly refrained from holding the instrument revoked, where the evidence of its intended destruction rests solely in parol. In the one case, though all the writing may still be legible, it is nevertheless a different paper from that executed by the testator. Its identity is to a certain extent destroyed, and that partial destruction was the consequence of its attempted revocation. It is true that in such case parol testimony must be resorted to, to show that the marks upon the paper itself were made in its attempted revocation under the statute, but such testimony is not so entirely subversive of the statute as evidence of an attempted destruction, wholly uncorroborated by the paper itself."

DEVISEE FRAUDULENTLY PREVENTING REVOCATION, HOW AFFECTED.—The intimation in the principal case, that where a revocation is prevented by the fraud of a devisee, he may be declared a trustee for those who would have been entitled if the revocation had taken place, finds some support in the fact that there have been similar *dicta* in other decisions: *Card v. Grimmer*, 5 Conn. 164; *Blanchard v. Blanchard*, 32 Vt. 62; see, also, *Clingan v. Mitcheltree*, 31 Pa. St. 27. Judge Redfield also seems to think that frauds of this kind might very properly be thus punished, but he admits that the law is not so: 1 Redf. on Wills, 319. It was expressly adjudged in *Kent v. Mahaffey*, 10 Ohio St. 204, that a devisee preventing a revocation of the will by fraud could not be declared a trustee, for this would be tantamount to allowing a

revocation by parol, and would thus repeal the statute by indirection. The point is very forcibly reasoned by the learned judge who delivered the opinion.

THE REVOKING ACT MUST BE COMPLETE, or it will not be effectual. In other words the testator must have finished what he intended to do to indicate his revocation of the will. If he desists, voluntarily or through the persuasion of others, after he has begun to burn, cancel or tear the will, it does not constitute a revocation however great may be the injury done to the instrument: *Moore v. Moore*, 1 Phill. 375. So where the testator being angry with his devisee, began to tear up his will, and having torn it into four pieces was prevented from proceeding further, and becoming pacified fitted the pieces together and said, that it was "a good job it was no worse:" *Perkes v. Perkes*, 3 Barn. & Ald. 489. So where the testator desisted after having partly torn his will in two: *Elms v. Elms*, 1 Swab. & T. 155.

BOWMAN v. HALSTEAD.

[2 A. K. MARSHALL, 200.]

ASSIGNEE OF NOTE, DEFENSES AGAINST.—The assignee of a note takes it subject to all available defenses existing at the time of the assignment, but discounts arising out of other transactions, after notice of the assignment, or any defense at law or equity arising after such notice, and not going to affect the consideration, cannot be set up against the assignee.

APPEAL from the circuit court. The opinion states the case.

Wickliffe, for the appellant.

Haggin, for the appellee.

By Court, **MILLS, J.** Daniel Halstead exhibited his bill in the court below, praying an injunction and relief against a note of five hundred dollars, executed by him to Noble & Bywaters, who had passed or transferred it to David Todd, who had indorsed it to Bowman, one of the appellants, who had obtained a judgment at law thereon. The equity set forth in his bill as grounds of relief, is that he had had other transactions with Noble & Bywaters, the original obligees. That he had lent them his notes for six thousand dollars, which had been negotiated with or transferred to the bank of Kentucky, and had also indorsed for Noble other notes, which had been negotiated likewise. That to indemnify him against these engagements for them, they had pledged or mortgaged to him other demands, and a tract of land; that what was pledged was not a sufficient indemnity; that the land was depreciated in value; that Noble & Bywaters were wholly and hopelessly insolvent, and that in all probability he should have to pay the lent notes,

and make good his indorsements for them without remuneration, unless he could be relieved from the payment of the note in question.

The defendant, Noble, in answer taken and filed for himself and partner Bywaters, confesses the assignment of the note in question, and the loan of the notes for six thousand dollars, and other indorsements of Halstead for him. The answer of Bowman denies any knowledge of the alleged equity; claims to be an innocent holder or purchaser of the note in contest; avers the consent of Halstead to its transfer, and his subsequent promises to pay it, and calls on Halstead to respond to those averments, who denies them. It appears, by a writing exhibited between Halstead and Noble & Bywaters, that he had really lent them his notes for six thousand dollars. And it is in proof that since the commencement of this suit, Halstead has paid some money for Noble, perhaps more than the contested note; that Noble is insolvent, but there is no proof that Bywaters is so. Indeed, the proof of one witness is, that he is solvent. On this state of the case, the court below perpetuated the injunction with costs, to reverse which decree, the defendants in that court have prosecuted their appeal. Halstead in his bill sets up no equity arising from the transaction on which the note is founded; nor does he attempt, in his bill, to impeach or invalidate its consideration, and the proof renders it evident that it was founded on a consideration entirely distinct from the loaned and indorsed notes. Halstead had not, at the date of filing his bill, and, of course, not at the time of notice of the assignment to Bowman, paid one cent on his engagements for Noble & Bywaters, which could attach to the note in question as a discount, while it remained in the hands of Noble & Bywaters; but only alleges the danger of being compelled to do so, which turned out to be the case as this suit progressed.

The main question, therefore, is, could Halstead avail himself of these partial payments, and danger of payments still more weighty, arising out of other transactions, unconnected with the note, so as to discount them against the note in the hands of Bowman, the assignee? The act of assembly regulating the assignment of bonds and other writing: 2 Lit. 75, declares notes to be assignable, and vests not only the legal right of, but the remedies on, such papers in the assignee; but, by our proviso, declares, "that the defendant shall be allowed all discounts (under the rules and regulations prescribed by law) he can prove at the trial, either against the plaintiff or the original

obligee or payee, before notice of the assignment." And a second proviso declares, "that nothing in this act contained shall be so construed as to change the nature of the defense, either in law or equity, that any defendant, or defendants, may have against an assignee or assignees, or the original assignor, or assignors." On the true construction of these clauses it is conceived the event of this suit materially depends. Did the legislature intend that only those defenses which attached to the note against the assignor, while it remained in his hands, should pass with the note on its assignment, and that the assignee should hold it clear of future contingencies arising from other transactions between the assignor and obligor; or did they design that such contingencies, resulting after the assignment, should follow the note and reach it in the hands of the assignee? As to discounts, this question presents no difficulty, only such as can be proved to exist, and have actually accrued, before notice of the assignment, can follow the note by the terms of the act. But on the second proviso the question presents itself in an attitude somewhat more formidable. Does a defense, either at law or equity, which a defendant can prove to exist at the trial against an assignor, but which did not exist at the notice of assignment, attach itself to and discharge a note?

The court conceives this question must be answered in the negative. By common law such papers were not assignable. This was an inconvenience to society, which the legislature determined to remove by the act in question. But while they did so they seem determined, by the last proviso, to guard against another evil, which might be equally mischievous; that is, the avoidance, by the negotiation of the paper, of an existing available defense against the note previous to its assignment. Such defenses by the statute must pass and follow the note, while the rights of the assignee are equally guarded by the legislature, and he must be allowed to hold the note free of future contingencies between the obligor and obligee, arising out of transactions *dehors* the note. According to these principles, then, existing discounts before notice of the assignment, arising from other transactions, and any defense at law or equity before such notice, or which go to affect its consideration, can and does follow the note, while the assignee is allowed to hold the paper discharged from defenses of a different character. Testing the claims of Halstead to relief by these principles, it is evident the decree in his favor is erroneous. He had not, even

at the date of filing his bill, any existing discount. He does not complain of or attempt to impeach his bill, the consideration of the note, but only sets up danger of suffering from other transactions, wholly unconnected with the note in question, which eventuated, partially, as his suit progressed, and on account of which the court has relieved him at the expense of the previously vested rights of Bowman. It is, therefore, decreed and ordered that the decree of the court below be, and the same is hereby reversed, with costs, and the cause is remanded to the court below, with directions to that court to enter up a decree dissolving the complainant's injunction, with the damages imposed by law, and dismissing his bill, with costs.

GRAY v. ROBERTS.

[2 A. K. MARSHALL, 208.] *K. J.*

A CONTRACT IN VIOLATION OF LAW is void, and the courts will neither enforce payment nor enable one who has paid money thereon to recover it if both parties are *in pari delicto*; but if the law violated was intended to protect one of the parties against the acts of the other, they are not *in pari delicto*, and the party designed to be protected may recover money paid in violation of such law.

MONEY PAID FOR LOTTERY TICKETS, where the lottery is forbidden by law, may be recovered, for the law is designed for the purchaser's protection; but if the money was paid under a judgment of a court of competent jurisdiction it cannot be recovered.

APPEAL from the circuit court. The opinion states the case.

Haggin, for the appellant.

Pope, for the appellee.

By Court, BOYLE, C. J. This was an action of assumpsit for money had and received, and was tried on the plea of non-assumpsit. On the trial it appeared that the plaintiff had executed four notes for twenty dollars each as the price of a lottery ticket, in a lottery set on foot by David Williamson, and that he had paid to the defendant, as agent for Williamson, the amount of the notes, a part of which was paid voluntarily and without suit, and a part after judgment had been rendered against him, therefor by a justice of the peace. It also appeared that Williamson, previous to setting on foot his lottery, had executed a deed conveying all the property of which the prizes in his scheme of a lottery were to consist, to trustees,

for the payment of his debts, and that the trustees had, since the drawing of the lottery, sold the property, and that it was not sufficient to pay the debts.

On the motion of the defendant the circuit court instructed the jury that the plaintiff could not maintain the action for the money paid either before or after judgment, although it should appear that the money had not been paid over by the defendant. The jury found a verdict according to the instructions of the court, and judgment being rendered thereon, the plaintiff appealed to this court.

There is no doubt that the contract for the purchase of the lottery tickets was void, and that the execution of the notes for the price imposed upon the plaintiff no legal obligation to pay the money. But whether, after the money was paid, he can sustain an action to recover it back, is a distinct question; for it is not in every case where money has been paid upon a contract which is void, that such an action can be sustained. It may, however, in some cases be done.

If both parties are equally guilty of a breach of the law, a court of justice cannot interpose its aid in behalf of either, for it is a settled rule, that *in pari delicto potior est conditio defendentis*; but where the transaction is in violation of a law made for the protection of one party against the acts of the other, they are not equally guilty, and the innocent party, when he has paid money upon such a transaction, may, without doubt, recover it back. Of this character are usurious laws, a familiar example in which, according to every day's practice, the borrower is permitted to recover back the excess he may have paid beyond the principal and legal interest; and the sale of a lottery ticket, in a lottery not authorized by law, is, we apprehend, a transaction of the same character. The act of 1769, for preventing and suppressing private lotteries, which was the law in force at the time of the contract in this case, appears manifestly, from the preamble of the act, to have been designed by the legislature to protect the interest of others against the devices of those who should set up a lottery; and the enacting clause is made to operate upon the latter only. For it is only persons who set up the lottery, and not those who purchase the tickets, that offend against the provisions of the act.

We are, therefore, of opinion, that the plaintiff in the circuit court had a right to recover, and that the circuit court erred in instructing the jury otherwise. But his recovery must be restricted to the money he paid without suit, and cannot be ex-

tended to that which he paid in satisfaction of the judgment before a justice of the peace.

The judgment having been given by a tribunal of competent jurisdiction, it is conclusive upon the parties, and they cannot be permitted to inquire into the merits, or to impeach its justice, in another suit.

The judgment must be reversed with costs, and the cause remanded, that a new trial may be had, not inconsistent with this opinion.

RECOVERY OF MONEY PAID ON AN ILLEGAL CONTRACT. — The distinction between cases where a party who has paid money, or conveyed property, on an illegal contract can recover it, and those where he cannot, is thus stated by Lord Mansfield, in *Smith v. Bromley*, cited in *Jones v. Barkley*, 2 Doug. 696: "If the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover; and it is astonishing that the reports do not distinguish between the violation of the one sort and the other." It is well settled, that money paid on contracts of the first class cannot be recovered. Thus, where money was paid upon an illegal contract of insurance upon a slaving voyage: *Touro v. Cassin*, 9 Am. Dec. 680. So, where land was conveyed pursuant to a contract to compound a felony: *Worcester v. Eaton*, 11 Mass. 368; and money paid on an unlawful wager cannot be recovered: *Howson v. Hancock*, 8 T. R. 575; see *Downs v. Quarles*, *ante*, 337, and note. But while the money remains in the hands of the stakeholder, the loser may recover it: *Cotton v. Thurland*, 5 T. R. 405; *Lacause v. White*, 7 Id. 535; note to *Downs v. Quarles*, *ante*, 337. Many other instances might be given.

WHERE A LAW IS DESIGNED TO PROTECT one class of persons against another, and imposes penalties only upon persons of the latter class, it is equally well settled, that the parties not being in *pari delicto*, those who come within the benevolence of the statute, may recover money paid on contracts made in violation thereof. Prominent in this class of contracts are those for the payment of usurious interest. Statutes against usury are generally designed for the protection of the necessitous borrower from the exactions of the money-lender and their penalties are usually denounced only against the latter. The borrower is presumed, not only to make the contract, but also to pay the exacted usury, under a species of duress and may, therefore, recover the excess of interest so paid. In one of the earliest reported cases: *Tompkins v. Bernet*, 1 Salk. 22, it seems to have been thought that the borrower was in *pari delicto* in such cases, and could not recover; but Lord Mansfield in *Smith v. Bromley*, 2 Doug. 696, rejected the authority of that case because it was "so loosely reported and stuffed with such strange argument," and in *Boaenquet v. Dashwood*, Talbot's Eq. Cas. 38, it was determined that where a borrower, who had paid usurious interest upon a contract, afterwards became bankrupt his assignees could recover the interest so

paid. The right of the borrower to recover in such cases is established in *Wheaton v. Hibbard*, 11 Am. Dec. 284. To the same effect is *Schroepfel v. Corning*, 5 Denio, 236, where Beardsley, C. J., stated the principle of such cases thus: "The borrower on such terms is the slave of the lender; nay more, a slave in chains, and utterly incapable of resistance. As to the usurer everything is held to be oppressive and tyrannical, to which an unresisting and passive submission is yielded by his victim. It is on this principle alone that the law gives redress to one who submits to usurious exactions. He is not looked upon as a free agent, nor as a violator of the law, and to such a case the *maxima, volenti non fit injuria* and in *pari delicto potior est conditio defendentis*, have no application."

OTHER INSTANCES OF RECOVERY of money paid on illegal contracts, in accordance with the doctrine stated by Lord Mansfield, are the following: Money paid on an unlawful contract to insure tickets in a lottery, has been held recoverable because the law was designed to punish and restrain lottery-keepers, and to protect their credulous, and often needy, patrons: *Browning v. Morris*, 2 Cowp. 790; *Clarke v. Shee*, 1 Id. 197; *Jaques v. Golightly*, 2 W. Bl. 1073; *Mount v. Waite*, 7 Johns. 434. So, money paid by a bankrupt to induce a creditor to sign his certificate of discharge, the former being in some measure at the mercy of the latter: *Smith v. Bromley* cited in *Jones v. Barkley*, 2 Doug. 696. Also money paid to an informer to compound an action for penalties for violating the statute against usury: *Jaques v. Whitby*, 1 H. Bl. 65. So money deposited in a bank payable at a future day certain, where the bank is prohibited from making contracts for the future payment of money, may be recovered before the day as on an implied contract, but not on the express contract: *Atlas Bank v. Nahant Bank*, 3 Met. 581; *White v. Franklin Bank*, 22 Pick. 181. So where one sold stocks to a corporation taking notes therefor on time, when the corporation was not allowed to make such notes, it was held that although he could not recover on the notes he could recover the value of the stocks as on an implied contract: *Tracy v. Talmage*, 14 N. Y. 162. Upon similar principles, it has been held that where a class of contracts is prohibited for the protection of particular parties thereto, the adverse parties cannot take advantage of the illegality of such contracts. Thus, where there was a statute prohibiting the loaning of public school funds, except on mortgages on unincumbered lands, it was held that one who borrowed such funds and gave a mortgage on incumbered land to secure the same, could not resist the enforcement of the contract as illegal, because the law was designed for the protection of the state and not of the borrower: *Deming v. State*, 23 Ind. 416, (overruling *State v. State Bank*, 5 Ind. 353); *Scotten v. State*, 51 Id. 52. So, in *Babcock v. Goodrich*, 47 Cal. 509, where the law required that contracts made by the state or a municipal corporation for labor should contain a stipulation that eight hours should be a day's work, and a contract was made with a county in which no such provision was inserted, it was held that the county could not take advantage of the omission because the law was meant for the protection of the laborer.

A PENALTY IMPOSED ON ONE PARTY alone, where the transaction is merely *malum prohibitum*, may usually be regarded as a convenient test for determining that the parties are not in *pari delicto*. This was the test adopted in the principal case. So in *Browning v. Morris*, 2 Cowp. 790, where Lord Mansfield announced the principle in these forcible terms: "The statute itself, by the distinction it makes, has marked the criminal." This test is not applicable, however, to cases where one of the contracting parties is a

public officer, and a penalty is imposed upon him to protect the interests of the state or county, as in *Deming v. State*, 23 Ind. 416; *Scotten v. State*, 51 Ind. 52.

THAT ACTIONS ON ILLEGAL CONTRACTS cannot be maintained, see *Seidenbender v. Charles*, 8 Am. Dec. 682, and note; *Wilson v. Spencer*, 10 Id. 491; *Hibernia T. Corp. v. Henderson*, 11 Id. 593; and *Morton v. Fletcher*, *ante*.

LINDSAY v. McCORMACK.

[2 A. K. MARSHALL, 229.]

JURISDICTION FOR PROBATE OF A WILL having once attached, is not divested by a subsequent division of the county.

ONE WITNESS IS SUFFICIENT TO PROVE A WILL, if he can testify to every fact necessary to its legal execution, although the statute may require two witnesses to attest it.

A FEE PASSES WITHOUT WORDS OF INHERITANCE in a devise if the testator, not having perfected his title, evinces an intention that the devisee shall take the same in his own name from the government.

A DEVISE IMPOSING A PERSONAL CHARGE on the devisee passes a fee without words of inheritance.

APPEAL from the circuit court. The opinion states the case.

Haggin, for the appellant.

Pope, for the appellee.

By Court, OWLEY, J. This is an appeal from a judgment rendered in favor of the appellees, in an action of ejectment brought against them in the circuit court by the appellants.

On the trial in that court, the appellants attempted to derive title to land in contest as heirs at law to Joseph Lindsay, deceased; but, for the purpose of showing the heirs had no title, and that the appellees claiming under Ann McGinty, formerly Ann Lindsay, widow of the said Joseph, were invested with the title, they introduced as evidence a copy of the will of said Joseph, taken from the record of the county court of Lincoln, together with the certificates of probate thereto annexed.

The admission of the copy was opposed by the appellants, on the ground of the will not being regularly proven; but the objection was overruled, and the copy used in evidence.

After the evidence was all gone through, it was agreed by the parties, that if the jury should be of opinion that the will of Joseph Lindsay was duly executed, they should find a verdict for the appellees, subject, however, to the opinion of the court on the legal import of the will; and if the court should

be of opinion that Ann Lindsay was entitled but to a life estate under the will, judgment should be entered for the appellants; but if the court should be of opinion that she was entitled to an estate of inheritance, judgment should be entered for the appellees.

A verdict was accordingly found for the appellees, and the court being of opinion the will gave to Ann Lindsay an estate in fee, rendered judgment upon the verdict in favor of the appellees.

In deciding this contest, two questions are presented: 1. Did the court err in admitting the will in evidence? And, if not; 2. What is the nature of the estate devised therein to Ann Lindsay?

The following are the certificates of probate annexed to the transcript of the will, made out by the clerk of Lincoln county court:

“ At a court holden for Lincoln county, the twenty-first of January, 1783, this instrument of writing was exhibited in court as the last will and testament of Joseph Lindsay, deceased, and proved by the oath of John Ray, the only surviving witness, and ordered to be recorded, etc. William May, C. C.”

“ At a county court held for Lincoln county, on Monday, the tenth day of April, 1815, the last will and testament of Joseph Lindsay, deceased, which was heretofore proven by John Ray, one of the subscribing witnesses, was this day again exhibited in court, and John McKee, and John McCullough, and Samuel Dennis were sworn, who declared, on oath, that they believe the will to be entirely in the handwriting of the said Joseph, deceased, and it was also proven to the court that John Kennedy, the other subscribing witness to the said will, was killed at the battle of the Blue Licks; whereupon it was ordered that the said will be admitted to record,” etc. “ *Teste.* Thomas Helm, C. L. C. C.”

It was admitted that, at the time of the testator's decease, he resided in the county of Lincoln; but it is contended the probate taken in 1783, as it was upon the oath of but one witness, is insufficient to prove the will; and as the testator resided in that part of Lincoln which was thereafter taken into the county of Mercer, the court of Lincoln had no authority, in 1815, to receive further proof of the execution of the will.

Considered in relation to either probate, we have no doubt the will was properly admitted as evidence. Upon the death of

the testator, the jurisdiction of the Lincoln court attached, and being possessed of competent authority to take probate of the will, the circumstance of the place of residence being thereafter taken into the county of Mercer, cannot have either prevented the exercise of it, or translated an authority in the court of Mercer to take the probate. But, if it could, yet as by the certificate of probate, taken before the formation of Mercer, the will appears to have been admitted to record, although upon the oath of one witness, it was clearly proper evidence.

The statute of wills in relation to the devising of land, it is true, requires the will to be in writing, signed by the testator or testatrix, or by some other person in his or her presence, and by his or her directions; and if not wholly written by him or herself, attested by two or more competent witnesses subscribing their names in his or her presence. This statute as to the making and attestation of the will, is substantially the same as that of England, except by the latter three witnesses are required, whereas by the former but two are required; and it has been invariably held by the courts of that country that one witness is sufficient to prove the will. The will must be proven to have been executed according to the requisitions of the statute; but, as by the certificate of probate, the will of Lindsay is shown to have been proven and admitted to record upon the oath of one of the subscribing witnesses, he must be presumed to have sworn to every essential fact to its due execution.

The will of Lindsay, therefore, having been properly admitted in evidence, the question occurs as to the nature of the estate given to Ann Lindsay by the will.

The provision in relation to the land in contest is as follows. "I give to my loving wife, Ann Lindsay, one thousand acres of land lying in the fork of Elkhorn, obtained by certificate from the commissioners of the district of Kentucky, granted to Fulton Lindsay, and conveyed to me by the bill of sale from said Lindsay, bearing date the twelfth of April, 1781. The said Ann is to pay Fulton Lindsay, junior, at the time he arrives at the age of twenty-one, two hundred pounds, provided she obtains a legal title for the same, also to pay off the heir of William Pogue, deceased."

It is contended on the part of the appellants, that as the devise to Ann Lindsay is in general terms to her, without containing any words descriptive of the nature of the estate intended to be devised, it should be construed to pass an estate for life and not of inheritance.

As Lindsay, the testator, died before the passage of the act of the Virginia legislature, dispensing with words otherwise necessary in a deed or will to transfer an estate or inheritance, the legal import of the devise must be deduced upon common law principles applicable to the construction of wills before the passage of the act. Testing the decree by those principles, there can, however, be little doubt but Ann Lindsay acquired an estate of inheritance and not barely an estate for life.

It is apparent from the devise, that no grant had been obtained for the land from the commonwealth when the will was made, and that it was intended by the testator to authorize a perfection of the title in the name of the devisee. It could not, therefore, have been deemed material by him in the devise to Ann to describe specifically the nature of the estate intended to be given, for as by obtaining a grant from the commonwealth, she would be invested with an estate in fee, he must have supposed that his intention to dispose of such an interest would be sufficiently clear by providing for her procurement of the title. As a question of intention, therefore, depending upon a construction of the will, we would have no hesitation in deciding that an estate of inheritance passed to Ann. But admitting, if no provision had been made requiring the devisee to pay Fulton Lindsay two hundred pounds, etc., the devise might have been differently construed, yet as that provision clearly imposes a personal charge, and not a charge upon the estate devised, the devisee must be held to have taken an estate in fee; for it is well settled that a devise which would otherwise pass but a life estate, by creating a personal charge upon the devisee, passes an estate of inheritance.

The judgment of the circuit court must, therefore, be affirmed, with cost.

PROOF OF WILL BY ONE WITNESS.—It is laid down in *Jackson v. Le Grange*, 10 Am. Dec. 237, that if one of the witnesses to a will can testify to a compliance with all the requirements of the statute, the instrument will be regarded as sufficiently proved, but that otherwise the other witnesses must be produced, if within the jurisdiction of the court, and if not, their handwriting, and that of the testator, must be proved. But in *Burwell v. Corbin*, 10 Am. Dec. 494, the majority of the court were apparently of the opinion that all the witnesses to the will, must, if possible, be produced, and that each of them must be able to testify to every fact made necessary by the statute to a due execution of the will. The latter case, however, has been much questioned, even in Virginia, where it was decided. See note to *Burwell v. Corbin*, 10 Am. Dec. 516. The doctrine of *Jackson v. Le Grange*, 10 Am. Dec. 237 (which accords with that of the principal case), that proof by one witness is sufficient, is the prevailing one in the American courts.

CLAIR v. BARR.

[2 A. K. MARSHALL, 285.]

THE INSOLVENCY AND DEATH OF THE MAKER of a note before it falls due, there being no estate or heirs or administration, will render the indorser liable, and the insolvency may be proved by parol.

THE MAKER'S INSOLVENCY, IF HE IS ALIVE when the note falls due, will not excuse the holder from using due diligence in suing him before resorting to the indorser.

WRIT of error to the circuit court. The opinion states the case.

Pope and Wickliffe, for the plaintiff in error.

Haggin, for the defendant in error.

By Court, BOYLE, C. J. This was an action by the assignee against the assignors of a promissory note, bearing date the twenty-fifth of May, 1811, negotiable and payable thirty-seven days after date, in the office of the Kentucky insurance company. The declaration, after averring the execution of the note, by the maker thereof to the defendants, and the assignment thereof by them to the plaintiff, for a valuable consideration, alleges, that the note was deposited in the office of the Kentucky insurance company for collection, and remained there until it became due; that neither the maker nor the defendants paid the same, nor any part thereof; that it was protested for non-payment, and that the maker thereof was, at the date thereof and when it became due, insolvent, and continued so until his death, which happened on the — day of —, without any estate to satisfy said note or any part of it. Of all which the defendants had notice, whereby they became liable to pay, etc.

The defendants pleaded the general issue, and on the trial the plaintiff offered to prove that the maker of the note was notoriously insolvent, from the time the note fell due until his death, which happened on the morning of the eleventh day of September, being the third day of the first term of the Fayette circuit court, next after the note became due, in which circuit he resided; that he died leaving no estate or heirs, and that no person had taken out letters of administration. But, at the instance of the defendants, the circuit court excluded all parol evidence of the insolvency of the maker of the note, and instructed the jury that to entitle the plaintiff to recover he must prove that, within due time, he had commenced and duly prosecuted suit against the maker of the note; to which opinion

of the court the plaintiff excepted, and a verdict and judgment having been given against him, he has brought the case to this court by writ of error.

There is no doubt that the plaintiff could not recover without proving the insolvency of the maker of the note, as he died before judgment, and execution could have been had against him, and left no representative, either as to his real or personal estate, it was utterly impracticable that his insolvency could have been established by any other than parol evidence. Such evidence must, therefore, under the circumstances of the case, have been admissible, and the court consequently erred in excluding it. But notwithstanding the insolvency of the maker of the note, it was still necessary for the plaintiff to show that he had used due diligence to collect the debt of him; for although he was without property, he might not have been without credit, and if due diligence had been used to collect the money of him, he might have made an arrangement to secure or satisfy the debt.

To show due diligence, it was, we apprehend, incumbent upon the plaintiff to prove that he had brought suit against the maker of the note before his death, as it was practicable to have done so. If the maker of the note had not died until after a period in which judgment and execution could have been had against him, it would, according to the repeated decisions of this court, have been the duty of the plaintiff to have brought suit before the time when, in fact, the maker of the note died; and we cannot perceive any principle upon which his death can excuse the performance of such duty.

The court were, therefore, correct in the instructions given to the jury, but as there was error in the exclusion of parol evidence of the insolvency of the maker of the note, the judgment must, on that ground, be reversed, with costs, and the cause remanded for a new trial to be had, not inconsistent with this opinion.

PROOF OF THE MAKER'S INSOLVENCY, it was held, in *Sullivan v. Mitchell*, 6 Am. Dec. 546, would excuse a demand upon him so as to charge the indorser of a note, if the latter were duly notified of the fact; and in *Kiddell v. Ford*, 6 Am. Dec. 569, it was intimated that the notorious insolvency of the maker would excuse both demand and notice. It was adjudged otherwise, however, in *Crossen v. Hutchinson*, 6 Am. Dec. 55; and *Sandford v. Dillaway*, Id. 99; and in the note to *Bond v. Farnham*, 4 Id. 47, it is shown that the maker's insolvency will not excuse demand and notice: See, also, Daniel on Neg. Inst. sec. 1172.

OWINGS v. FRIER.

[A. K. MARSHALL, 202.]

THE SEIZURE OF THE GOODS OF A THIRD PERSON under an attachment against the defendant's property, is a mere trespass, and no act of the officer or order of the court will divest the owner's right.

THE OWNER MAY WAIVE THE TORT in such case, and sue for the detention of the goods, the law giving him a choice of remedies.

APPEAL from the circuit court. The opinion states the case.

Tulbot, for the appellant.

Bibb, for the appellee.

By Court, BOYLE, C. J. This was an action of detinue, for sundry articles of property in the declaration particularly described. The defendant pleaded the general issue, with leave to give any special matter in evidence.

On the trial, various questions of law were made, all of which were decided by the circuit court for the plaintiffs. The jury, however, found a verdict for the defendant, and the plaintiffs moved the court for a new trial, on the grounds that the verdict was against law and evidence, but the court overruled the motion, and gave judgment upon the verdict for the defendant, from which the plaintiffs have appealed to this court. The only error assigned is in the refusal of the court to grant a new trial.

In point of fact, the evidence adduced on the part of the plaintiffs clearly sustained their right to recover, and unless some of the questions of law, made on the trial in the circuit court, were erroneously decided by that court, a new trial ought to have been awarded.

The only point relied on in the argument in this court, as having been erroneously decided by the circuit court, is, that the action was misconceived. The defendant, it appears, had taken the goods, in the declaration mentioned, as deputy sheriff, in virtue of an attachment which had issued against one Lawson, and having returned that he had so taken them, he was, by the order of the circuit court, directed to sell them, but before they were sold, this action was commenced.

It is evident that the attachment gave to the defendant no authority to take the goods of the plaintiffs, and that in doing so he was a mere trespasser. The property of the goods must, therefore, still have remained in the plaintiffs, for the act of seizing goods by a trespasser cannot change the property of them, nor could the order of sale by the circuit court have that

effect, for that order was, no doubt, made upon the faith of the verity of the defendant's return, as sheriff, that they were the goods of the defendant in the attachment. If, then, the goods belonged to the plaintiffs, and they were detained by the defendant, there can be no room to doubt the correctness of the decision of the circuit court, that the action was properly conceived, for the identity of the goods not being questioned, the only remaining requisites to enable the plaintiffs to maintain the action were: 1. Property in the plaintiff; 2. Detention by the defendant. It is true, that the plaintiffs might have maintained trespass or trover, also, but wherever the law affords several remedies, the party may elect which he will pursue. Formerly it was doubted whether detainee would lie where the defendant came tortiously into the possession of the goods, but it has been settled that the plaintiff may waive the tort in taking the goods, and bring detainee for the detention: *Mansel's administrator v. Israel*, 3 Bibb. 510.

As to the other points of law made on the trial in the court below, we are clearly of opinion they were correctly decided, and as the correctness of the decision of that court upon those points was not questioned in the argument, we deem it unnecessary particularly to notice them.

It consequently results that the circuit court erred in not granting a new trial.

The judgment must be reversed with costs, and the cause remanded to the circuit court, that a new trial may be awarded upon the usual terms.

LEVYING UPON THE PROPERTY OF A STRANGER.—"The officer has no authority for touching the property of any person except that of the defendant. If he does so the writ affords no justification, for the act is not in obedience to its mandate: *Rhodes v. Patterson*, 3 Cal. 369; *Van Pelt v. Litter*, 14 Id. 194; *Saunders v. Baker*, 3 Wils. 309; 2 W. Bl. 832; *Ackworth v. Kempe*, 1 Doug. 40; *Pac. Ins. Co. v. Conrad*, 1 Bald. 138; *Sangster v. Commonwealth*, 17 Grat. 124; *Carmack v. Commonwealth*, 5 Binn. 184; *State v. Moore*, 19 Mo. 369; *Archer v. Noble*, 3 Greenl. 418; *Harris v. Hanson*, 11 Me. 241; *People v. Schuyler*, 4 N. Y. 173; *State v. Tatom*, 69 N. C. 35; *Jarmain v. Hooper*, 7 Scott N. R. 663; 1 D. & L. 769; 6 M. & G. 827; 8 Jar. 127; 13 L. J. C. P. 63. * * His act makes him a trespasser, and being such, he is entitled to no indulgence. 'The sheriff having misapplied his process, and whether by mistake or design will make no difference, stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance that the property was in the possession of the execution debtor at the date of the signature, amounts to nothing, except upon proof of fraud or commixture.' *Boulware v. Craddock*, 30 Cal. 190, *contra*; *Vose v. Stickney*, 8 Minn. 75; *Dodge v. Chandler*, 9 Id. 97. The owner whose property has been

taken under a writ to which he was not a party, has his choice of remedies by which to seek redress: *Yarborough v. Harper*, 32 Miss. 112; he may sue in trespass or in trover: *Lyon v. Gores*, 15 Ala. 360; or, he may recover the property taken: *Grimble v. Ackley*, 12 Iowa, 27; *Smith v. Montgomery*, 5 Id. 370." Freeman on Ex., sec. 254.

BATES v. AUSTIN.

[2 A. K. MARSHALL, 270.]

NOTICE TO QUIT IS UNNECESSARY if the tenant disclaims to hold under his landlord, and refuses to pay rent, and a warrant for forcible detainer may be instantly brought.

APPEAL from the circuit court. The opinion states the case.

B. Hardin, for the appellant.

Hardin, for the appellee.

By Court, OWSLEY, J. This is an appeal from a judgment rendered against Bates, the plaintiff in the warrant, on the trial of a traverse taken to the inquest of a jury, had under the law regulating the proceedings in cases of forcible entries and detainers.

The only question necessary to be noticed in the determination of the cause, involves an inquiry into the court's refusal to award a new trial.

The application for a new trial was made upon the ground of the verdict being against evidence. The warrant was brought for a forcible detainer, and Bates, the plaintiff, proved that Austin leased the premises from him, and occupied the same, and paid rent from year to year, commencing in February; and that in June, prior to the date of the warrant, he applied to Austin to renew, as usual, his lease; but Austin refused, declaring he would no longer hold under him, or pay rent; whereupon Bates demanded possession of the premises, but Austin refusing, Bates sued out the warrant for a forcible detainer. This was all the evidence conducing to the proof of any material fact in contest between the parties.

Were it not for the circumstance of Austin's disclaiming to hold the premises under Bates, and his refusal thereafter to pay rent, there could have been no question, but the finding of the jury would have been correct. In the absence of that circumstance, the evidence would have shown that Austin held the premises as tenant, from year to year, commencing in February; and in that case, to have authorized Bates to recover the

possession, it would have been incumbent on him to have proven that he had, six months anterior to the expiration of the year, given Austin notice to quit. But considered in connection with the circumstance of Austin's disclaiming to hold under Bates, we are of opinion the verdict of the jury cannot be sustained.

After disclaiming to hold under the landlord, the doctrine is well settled, that the tenant is not entitled to notice to quit; and although Austin might otherwise have been considered as holding the premises for the year in which the application was made to him to renew the lease, his having, upon the application, disclaimed to hold under Bates, and refused to pay rent, and Bates having assented thereto, by demanding the possession, the lease must, by the mutual assent of the parties, be considered as having expired, and, consequently, Austin's refusal thereafter to restore the possession, must be considered a forcible detainer, for which Bates is entitled to restitution.

The verdict of the judge, therefore, in favor of Austin, should have been set aside, and a new trial awarded. The judgment must, consequently, be reversed, with cost, and the cause remanded, and further proceedings had, not inconsistent with this opinion.

In *Fortier v. Balance*, 5 Gilm. 41, it was held that a tenant for years, who, before the end of his term, disowned his landlord's title, and attorned to another, thereby put an end to his lease. Trumbull, J., delivering the opinion of the court, said: "Notwithstanding Blumb had a lease for a term not then expired, the moment he disclaimed to hold under the lease, and set up title to the premises, his possession became adverse to his landlord, and it would be strange, if, while his title was maturing by adverse possession, he could claim the protection of the lease to prevent his being turned out. 'A tenant disclaiming his landlord's title, is not entitled to notice to quit; but is liable instantly to a warrant of forcible detainer.' *Bates v. Austin*, 2 A. K. Mar. 270. Blumb, in setting up a title adverse to that of Balance, by his own act terminated the lease, and put an end to the time for which the premises had been let, just as effectually as if the full term of six years had expired."

CHILES v. COLEMAN.

[2 A. K. MARSHALL, 296.]

A DEED FROM HEIRS PURPORTING TO CONVEY THEIR INTEREST, and not a particular tract of land, simply puts the purchaser in their place, and if they could not recover he cannot.

A VALUABLE CONSIDERATION MUST BE EXPRESSED in a deed of bargain and sale, and its adequacy cannot be questioned between the grantor or his heir and the grantee, but only by creditors or purchasers.

WHERE A CONSIDERATION IS EXPRESSED in a deed, the grantor or his successors in interest cannot aver or prove that there was no consideration, but they may show that the consideration was vicious and illegal, and to rebut this the grantee may prove a legal consideration different from that expressed.

A BOND GIVEN ON A GAMING CONSIDERATION, to convey land, does not bind the obligor; but if the bond be assigned to a *bona fide* purchaser for value, and the obligor convey to him, neither he nor his heirs or representatives can afterwards question the consideration, where the statute against gaming vitiates deeds only in the hands of the winner.

APPEAL from the circuit court. The opinion states the case.

Bibb, for the appellant.

Crittenden, for the appellee.

By Court, BOYLE, C. J. This was an action of ejectment. On the trial, the lessor of the plaintiff produced in evidence a patent from the commonwealth to William Hays, for a pre-emption of one thousand acres, bearing date the tenth of January, 1785, and a deed of conveyance from the heirs of William Hays to himself, bearing date the eighth day of January, 1817, and purporting to convey "all the right, title, interest, and claim which they have in law or equity, in and to all the lands situated and being in Kentucky, which they may be entitled to as heirs of William Hays, deceased."

He proved the death of Hays, the boundary of the tract of land, and that the defendants were in possession. The defendants, on their part, produced a deed from Hays to James Calloway for the same tract of land, expressing to be made for the consideration of five shillings, and bearing date the sixth of March, 1788; and they proved by Caleb Calloway that in 1781 or 1782, a certain Thomas Brooks proposed to sell him a bond which he held on Hays, for the conveyance of the tract aforesaid; and that before he would make the contract with Brooks, he went to Hays who informed him that there was no objection to the bond, and that he would make a deed to any one who would bring the bond to him; that he afterwards made a verbal contract with Brooks, and paid him a negro man for the bond, and received it without an assignment, Brooks refusing to assign it; that subsequently thereto, he sold the land to James Calloway for about the same amount which he had given for it; and being authorized by James Calloway to do so, he procured a conveyance to him from Hays, to whom he delivered the bond for a conveyance to Brooks.

The lessor of the plaintiff then proved by a witness that in

the year 1780 or 1781 Hays and one Hoy made a horse-race, on which Hays bet with Hoy the one half of his, Hays's, pre-emption; that the race was run at Boonsborough, and was won by Hoy. The witness did not know that Hays had given his bond to any person for one half of the pre-emption thus lost, but he knew that it was his mode of transacting business of that sort, to have the bonds drawn and staked; but whether it was so drawn in this case he did not know, nor did he know that Brooks had anything to do with the race, or that he was any way concerned; nor did he know anything of Hays's losing, or of Hoy's winning the other half of the pre-emption. The lessor of the plaintiff also proved, by another witness that he was well acquainted with Hays, and Hoy and Brooks; that they were in the habit of racing at Boonsborough in the years 1781 and 1782, and connected in that kind of business; that he lived in the same station with Hoy and Brooks, and heard that a race had been run between Hoy and Hays, in which Hoy won of Hays his pre-emption of one thousand acres. He also frequently heard that it had been so arranged between the parties that the statute against gaming would be defeated of its operation. Of these facts he had no knowledge, except by report from others, but thinks he heard the same from the parties. He knew nothing of any bond from Hays to Brooks, or of any bond being executed for the land lost as aforesaid.

On this evidence the counsel for the lessor of the plaintiff moved the court to instruct the jury that if they should be of opinion that no consideration was paid to Hays, that the deed from him to Calloway passed no title; or that if they should find that the deed was executed by Hays in consideration of a gaming transaction, or horse-race, that it was void. The court refused to give the instructions as asked for, but instructed the jury that if James Calloway, under whom the defendants claim, was a purchaser for a good and valuable consideration, the law would support such purchase, although the consideration might not have passed to Hays from Calloway, provided that Calloway purchased without any participation in, or knowledge of, the unlawful gaming between Hays and Hoy, and that if Calloway was an innocent purchaser for a valuable consideration, his purchase was in law protected from the operation of the statute against gaming. And furthermore instructed the jury, if they should believe from the evidence that Caleb Calloway was induced to purchase the bond for the land in contest, of Brooks, by the assurance of Hays that it was good, it was a sufficient

consideration to support the deed from Hays to James Calloway, provided Caleb Calloway was ignorant of the illegal consideration. To the opinion of the circuit court the lessor of the plaintiff excepted, and a verdict and judgment having been rendered against him, he has appealed to this court.

The main question presented by the record is, whether the deed from Hays to Calloway is valid or not? The validity of the deed is attempted to be impeached by the instructions asked for on the part of the lessor of the plaintiff, on the ground either that there was no consideration paid to Hays, or that the consideration was a gaming one. In revising the decision of the circuit court upon these points, it is proper to premise that as the deed from the heirs of Hays to the lessor of the plaintiff purports to convey to him not the specific tract of land in controversy, but only their right to such lands as they were entitled to as heirs, it is obvious that he cannot occupy a more favorable attitude in this contest than they themselves would have done had they been seeking to recover the land in their own names; and of course, if the deed from Hays to Calloway is valid, as against them, it must be equally so against the lessor of the plaintiff.

To the efficacy of a deed of bargain and sale a valuable consideration is no doubt indispensable, for a sale *ex vi termini* implies a recompense or consideration. But it is only as against creditors and purchasers that an adequate consideration is necessary. As against the bargainor and his heirs, or those who represent their rights only, the question of consideration is immaterial. The consideration, therefore, expressed to be received by Hays in the deed from him to Calloway, is, notwithstanding its apparent inadequacy, sufficient to render the deed operative as against the bargainor and his heirs. And where a deed thus expresses a sufficient consideration upon which it purports to have been made, an averment or proof that there was no consideration, is immaterial: Shep. Touchstone, 222; 1 Bac. Abr. tit. Bargain and Sale, letter D. The instruction to the jury, therefore, that if they should be of opinion that no consideration was paid to Hays, the deed from him to Calloway passed no title, being asked for on the predication of a fact which could not be averred or proved, was correctly refused by the circuit court.

But, notwithstanding, it was inadmissible to aver or to prove, that there was no consideration for the deed, it was competent for the lessor of the plaintiff to show that the consideration was

vicious or illegal, for otherwise the policy of the law in making a deed founded on such illegal consideration, void, would, by the parties expressing on the face of the deed a legal consideration, be defeated. If however, it was competent for the lessor of the plaintiff to show by evidence *dehors* the deed, that the consideration was illegal, it was equally competent for the defendant to repeal such evidence by proof of a legal consideration, although different from that expressed in the deed. We are then led to inquire whether the circuit court erred in its decision upon the effect which the gaming consideration of the bond given by Hays to Brooks ought to have in relation to the deed made by Hays to Calloway. The bond, on the supposition of its being founded on a gaming consideration, was no doubt, void, but Hays was under no legal obligation to comply with it; but as Calloway was ignorant of the illegal consideration of the bond, and paid to Brooks a valuable consideration for it, the deed made to him cannot be affected by the illegality of the consideration of the bond. As between Calloway and Hays there was nothing illegal, and the true consideration of the deed is, not what Hays received, but what was paid by Calloway. Such would indisputably have been the case if the bond to Brooks had never existed, and Hays had conveyed to Calloway for the sum paid by the latter to Brooks, and we cannot perceive how the existence of the bond, which in law was a mere nullity, can change the case. A bond given to the lender by the borrower of money upon usurious interest, is void; but if it be given by the borrower to a person not privy to the usurious agreement, and to whom the lender is justly indebted so much money, it cannot be avoided by the usury: Cro. Jac. 32. So a bond given by the loser to the winner for the payment of money won at play, is void by the statute against gaming; but if the bond be given to a person to whom the winner is justly indebted in the same amount, and who is not privy to the money being won at play, it is held not to come within the statute: 3 Bac. Abr., title, Gaming, letter B.; 2 Mod. 279.

In these cases, the consideration of the bond executed by the borrower or loser, is the money justly due to the obligee, and not the money borrowed or lost, and in this respect it is impossible to distinguish, in principle, these cases from the one before the court.

The statute of Virginia against gaming, which was the only law in force at the date of the deed in question, in this case is manifestly based upon the same principle. For although the

statute makes void conveyances, etc., to satisfy or secure money or other thing won, etc., whereof money or anything won; etc., is a part or all of the considerations, and declares that such conveyances, etc., shall inure to the use of the heirs of the seller, yet according to the language of the statute it applies only to such conveyances as are made "to any person, or for his to use, to satisfy or secure money or other thing, by him won of, or lent, or advanced to the seller, etc., or whereof money or other thing so won, or lent, or advanced, shall be part or all of the consideration-money."

Now it is evident that the conveyance in question in this case was not made to any person, or for his use, to satisfy or secure money, or other thing, by him won, etc., and that the consideration of the conveyance was neither in whole nor in part money so won, etc.; that is, money won, etc., by him to whom the conveyance was made. According to the plain import of the statute against gaming, therefore, the heirs of Hays could not recover against the deed made to Calloway, and, of course, of the lessor of the plaintiff only, who claims under the heirs, and to the extent of their right, cannot recover. The case of *Reed v. Harrod's Heirs*, Pr. Dec. 290, is very similar in its prominent features to this; and in that case the court gave the same construction to the statute which we have done in this.

There was, therefore, no error in the refusal of the court to give the instructions asked for by the lessor of the plaintiff, nor in the instructions the court gave to the jury.

The judgment must be affirmed, with costs.

CONTRADICTING RECITAL OF CONSIDERATION.—On this subject, see the note to *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 306. See, also, *O'Neale v. Lodge*, 1 Id. 377; *Duval v. Bibb*, 4 Id. 506; *Sneed v. Hooper*, 5 Id. 691; *Harvey v. Alexander*, 10 Id. 519; *Bowen v. Bell*, 11 Id. 286.

GAMING CONTRACTS.—See on this subject, *Downs v. Quarles*, ante, 337, and note.

BRECKENRIDGE v. BROOKS.

[2 A. K. MARSHALL, 335.]

RECONVEYANCE BY MORTGAGEE—EQUITY JURISDICTION.—Where land has been conveyed to secure a loan and a bond taken to reconvey, equity alone can compel a reconveyance after payment of the loan, and the power to adjust the accounts is incident to the jurisdiction.

JURISDICTION IN MATTERS OF ACCOUNT is concurrent in courts of law and equity, but after a settlement by the parties without error or fraud, and a balance struck, equity has no jurisdiction.

A MORTGAGEE IS NOT ENTITLED TO COMPENSATION, for managing the estate himself, beyond interest on the money loaned.

COMPOUND INTEREST, though not forbidden by the statute against usury, is iniquitous, and equity will not enforce its payment even where there is an agreement to pay it.

INTEREST UPON RENT IN ARREARS will not be allowed, because it is in the nature of compound interest, rent being merely compensation for the use of land.

A MORTGAGEE IN POSSESSION IS LIABLE FOR RENTS received, but not for interest thereon since he receives no compensation for his services; the interest will be set off against his services.

CROSS-APPEAL from the circuit court. The opinion states the case.

Crittenden, for Breckenridge.

Pope, contra.

By Court, BOYLE, C. J. On the ninth of November, 1799, Breckenridge paid for Brooks the sum of four thousand one hundred and twenty-seven dollars and ninety cents; and, to secure Breckenridge, Brooks conveyed to him, by an absolute deed, his Manslick estate, but took from Breckenridge a bond for the reconveyance thereof, upon Brooks refunding to Breckenridge the aforesaid sum, and other moneys which Breckenridge might thereafter advance for Brooks. Not long afterwards, Breckenridge, in virtue of a parol agreement with Brooks to that effect, took the estate into his possession and management, and for many years continued to receive the rents and profits, during which time he advanced, as occasion required, sundry considerable sums of money and property to Brooks, and to others for his benefit.

At length the parties having become desirous of closing the business, on the twenty-sixth of November, 1811, entered into a writing, signed by both of them, in which they recite, in substance, that, by the terms of the original contract, the legal interest on all the sums advanced by Breckenridge for Brooks was to have been paid annually or a bond given therefor; but it being inconvenient for Brooks to pay the interest or principal when it became due, Breckenridge had postponed the collection of the same in consideration of Brooks's verbal promise to pay an interest of twelve and a half per centum per annum, in the same manner that the legal interest was to have been paid, that is, at the end of each year, the amount of interest, if not paid as it became due, was to become so much principal; they then stipulated that they will settle upon the principle of allowing

to Breckenridge compound interest, at the rate of twelve and a half per cent. per annum, and agree that two annexed lists, the one of demand of Breckenridge against Brooks and the other of credits or demands to which Brooks was entitled, should be credited on the settlement, and that errors or omissions on either side should be adjusted.

Brooks refused afterwards to close the settlement upon these principles, and filed this bill in chancery, alleging that there was an usurious interest reserved to Breckenridge by the original contract of 1799, as well as by that of 1811, and prays that the accounts may be settled without allowing to Breckenridge interest on the advances made by him, and for general relief. By an amended bill he alleges that in the lists of debits and credits recognized by the contracts of 1811 there are errors and omissions to his prejudice, a specification of which he subjoins in the bill. Breckenridge, in his answer, denies that the original contract reserved to him an usurious interest, or that he ever lent or advanced to Brooks any money for more than legal interest; and he calls upon Brooks to produce the bond he gave to Brooks, which contains the terms upon which the money was advanced. He alleges that the surplus above legal interest, which Brooks stipulated in the contract of 1811 to pay, was intended as a compensation for his services in the management of the salt-works belonging to the mortgaged estate. He does not admit that there are any errors or omissions in the lists of debits and credits recognized by the contract of 1811, alleges that the vouchers by which those lists could be verified had been delivered into the hands of Brooks, and calls upon him to produce them.

The circuit court appointed a commissioner to adjust the accounts and report the result; first taking the lists of debts and credits, referred to in the contract of 1811, and allowing Breckenridge an interest of twelve and a half per cent. per annum, according to that agreement; secondly, taking the same lists of debts and credits, and allowing interests to Breckenridge of six per cent. on the advances made by him, upon the principle of the act of assembly of 1799; and, thirdly, taking the same lists of debts and credits without interest, but with such omissions and surcharges as might appear to be supported by the evidence in the cause.

The commissioner made a report accordingly; the result of which, when the accounts were adjusted, as first above directed, left a balance due to Breckenridge, but when settled in either of the other modes, left a balance in favor of Brooks.

The circuit court, on a final hearing, decreed Breckenridge to pay to Brooks the balance reported in his favor, upon the calculation made in pursuance of the second mode directed, together with the amount of surcharges and omissions, to the prejudice of Brooks, amounting in the whole to the sum of twelve thousand five hundred and seventy-seven dollars and ninety-five cents. From that decree both parties have appealed to this court.

Previous to an examination of the merits of this case, it is necessary to notice an objection taken by the counsel of Breckenridge to the jurisdiction of a court of equity.

It is urged that Brooks had an adequate remedy at law, and that, consequently, there was no cause for the interposition of a court of equity. It is a sufficient answer to this objection, that it does not appear that Breckenridge had reconveyed the mortgaged estate. The first is not alleged by either party, nor is the deed of reconveyance exhibited; and it cannot be pretended that a court of law is competent to compel Breckenridge to reconvey. That could be done only by a court of equity, and the power to adjust the accounts and to decree the balance, must, as a necessary incident or accessory, follow the jurisdiction to compel the reconveyance, according to the maxim, "*accessorium sequitur suum principale*."

But admitting the reconveyance to have been made, we should, nevertheless, be of opinion that a court of equity might entertain jurisdiction of the case. What remedy at law could Brooks have had? He could have had none upon the bond for a reconveyance, for that did not contemplate the receipt of the rents and profits of the mortgaged estate by Breckenridge, and the only covenant it contained on his part was to reconvey. Upon the supposition, therefore, of a reconveyance having been made, he had performed his covenant. Nor could Brooks have had a remedy at law upon the contract of 1811, commensurate with the object of the bill in this cause; for had he sought a remedy by a suit at law upon that contract, he must thereby have affirmed it; whereas the object of the present suit is not only to obtain a correction of the details, but to avoid the principles of adjustment recognized by that contract. The bill is, indeed, predicated upon the idea that the contract of 1811 is not obligatory upon Brooks, on the ground of its being usurious; and assuming that to be the case, there is no doubt that he might maintain an action of account or of assumpsit for the rents and profits; but it is equally clear that a bill in chancery will also

lie to compel Breckenridge to account for the rents and profits; for it is incontrovertibly settled that a court of equity has a concurrent jurisdiction with a court of law in matters of account. But if we suppose the contract of 1811 to be obligatory upon the parties, still we could not admit that it would preclude the filing of a bill for the adjustment of the accounts. It is true, where parties have settled their accounts and struck the balance, that unless there were fraud or error in the settlement, a bill for an account will not lie; and to such a bill a plea of stated account is held to be a good bar. But a plea of that sort, to be sufficient, must set forth the balance: 2 Atk. 379; and it must aver that the stated account is just and true: 8 Id. 70; Mitford's Pleadings, 208; but in this case there was in fact no settlement of the accounts, nor balance struck, by the contract of 1811. It only purports to ascertain the principles, and to recognize the data upon which a future settlement was to have been made. In whatever point of view, therefore, the case is considered, it is manifestly a proper one for the jurisdiction of a court of equity.

On the merits of the case, it is contended on the part of Breckenridge, that he is entitled, in the adjustment of the accounts, to an interest of twelve and a half per cent. per annum upon the sums advanced by him, according to the principles of the contract of 1811, while, on the part of Brooks, it is urged that Breckenridge is entitled to his principal only, without interest.

It cannot be pretended that Breckenridge is entitled to the twelve and a half per cent. merely for the loan or forbearance of the sums advanced by him, for that would be directly repugnant to the statute against usury. His claim is placed by his answer, and was attempted, in the argument, to be maintained only upon the ground that the surplus above legal interest was a compensation for his services in the management of the mortgaged estate. There is in the cause some parol proof of the declaration of Brooks that was to allow Breckenridge twelve and a half per cent. for interest, and his services. But the contract of 1811, which is more to be relied on, affords no color of support to the claim on that ground; on the contrary, the contract plainly imports that the agreement on the part of Brooks to give the surplus per cent. was founded exclusively upon the forbearance, or the postponement of the collection by Breckenridge, of the principal and interest of the sums advanced by him when they became due. But the doctrine is incontro-

vertibly settled, that where a mortgagee or other trustee manages the estate himself there is no allowance to be made for his trouble, and although there be an agreement to that purpose, yet a court of chancery will not carry it into effect, for equity will not allow to the mortgagee any more than his principal and interest: *Powel on Mortgages*, 1027; 1 Ver. 316; 3 Atk. 518; 2 Id. 120.

By the original agreement, as recited in the contract of 1811, Breckenridge reserved to himself compound legal interest upon the money advanced by him; and that is clearly not forbidden by the statute against usury, but it is held to be iniquitous and oppressive, and a court of equity will not enforce an agreement of that sort: 5 Salk. 449; 2 Atk. 330. It is evident, therefore, that Breckenridge can only be entitled to simple interest at the rate of six per cent. per annum upon the sum advanced by him. He would, indeed, only be entitled to his principal without interest, if, as Brooks alleges, the original contract, in pursuance of which the advances were made by Breckenridge, had reserved the usurious interest of twelve and a half per cent. But that does not appear to be the case, and the subsequent agreement for the payment of such usurious interest cannot affect the validity of the original contract, nor destroy Breckenridge's claim to the interest of six per cent. reserved thereby.

The circuit court, therefore, did right in allowing to Breckenridge, in the adjustment of the accounts, simple legal interest and no more. And we perceive no error in that court decreeing to Brooks the amount of the errors and omissions to his prejudice, in the list of debits and credits recognized by the parties in the contract of 1811.

Decree affirmed with damages, each party paying the costs of the appeals taken by him.

OWSLEY, J., absent.

A rehearing having been granted, the cause was reargued at spring term, 1820, and the following opinion delivered June 6, 1820:

By Court, BOYLE, C. J. In the former argument of this case, nothing was said in relation to Breckenridge's liability to Brooks for interest upon the rents and profits received by him, while in possession of the mortgaged premises, and the subject having wholly escaped the attention of the court in forming the opinion then delivered, a rehearing was, at the instance of Breckenridge's counsel, granted upon this branch of the case.

It becomes necessary, therefore, now to decide how far the decree of the circuit court, compelling Breckenridge to pay interest upon the rents received by him, is correct.

Whether we consider this point with reference to general principles, or to adjudicated cases, the conclusion is equally clear, that Breckenridge ought not to be compelled to pay interest.

In the former opinion, delivered in this case, we have seen that interest upon interest will not be decreed, although the parties may have made an engagement to that effect, because it is unjust and unconscientious; and the same principle must equally forbid the allowance of interest upon rents and profits, for rent is nothing but a return or remuneration for the use of real estate, as interest is for the use of money, and it must be as unjust to allow interest upon the remuneration in the former case, as it is to allow it upon the latter. In analogy to general principles, therefore, there can be no doubt that interest upon rents ought not to be allowed, and, if possible, there is still less room for doubt upon this point upon the score of authority. It is settled that a general interest will not be allowed upon the arrears of annuity: 2 Fonb. 424, note d. and the cases there cited; and with respect to rents, it has been held that even in an action of debt upon a lease where the rent was not secured by penalty, it was erroneous for the judge to give interest by way of damages: *Cook v. Wise and Newnton*, 3 Wilson; 8 Hen. and M. 483. And if, in such a case, where the amount to be paid is fixed by the express agreement of the parties, the law will not allow interest, much more will equity, which follows the law, not allow interest upon rents in a case like the present, where the amount to be paid, is not ascertained by the agreement of the parties. It is, accordingly, emphatically said by the chancellor, in the case of *Ferries v. Ferries*, Talbot's cases, 2, 3, that interest upon the rents and profits of an estate, was never decreed, the sum being entirely uncertain. We will not say there may not be special circumstances which would justify allowing interest upon rents received by a mortgagee, but so far are the circumstances of this case from sanctioning the claim to interest, that they strongly forbid it. The proof in the case shows that Breckenridge managed the estate with great care and labor, and much to the advantage of Brooks, yet we have seen in the former opinion, that, upon general principles, Breckenridge could not be allowed any compensation for his services; but notwithstanding he could not be allowed any com-

pensation for his services, his claim may be used to repel the claim of Brooks for interest upon the rents and profits, for it cannot be in itself less just than that of Brooks, and the latter is equally forbidden to be allowed upon general principles.

The argument that because Breckenridge received interest upon the money advanced by him for Brooks, the latter ought to be entitled to interest upon the rents received by Breckenridge, is certainly not well founded. The two claims do not stand upon the same footing.

The money advanced by Breckenridge for Brooks was in discharge of debts which, in general, bore interest, and besides there was an express agreement on the part of Brooks to pay interest on the sums advanced by Breckenridge; whereas there was no such agreement on the part of Breckenridge to pay interest on the rents received by him.

Some of the money advanced by Breckenridge for Brooks was, no doubt, that which he had received for rents, after he had obtained possession of the mortgaged premises. But as Brooks was allowed a credit for the rents as they were received, upon the original debt due from him to Breckenridge, which bore interest, he can have no cause to complain on that ground. In fact, until the extinguishment of the debt due to Breckenridge, the controversy about the interest upon the rents could not arise, and it is evident from what has been already said, that on the rents afterwards accruing, Brooks's claim to interest cannot be sustained.

The former decree of this court, therefore, affirming the decree of the circuit court must be set aside, and the decree of that court must be reversed, and the cause remanded, that an account may be therein taken and a final decree entered, not inconsistent with this and the former opinion of this court. Brooks must pay the costs in both appeals.

INTEREST ON RENT IN ARREAR.—It is now provided by statute in Kentucky, that "rent, after it is due, shall carry interest like other liabilities originating in contract:" 2 Stanton's Rev. St. 92, ch. 56, art. 2, sec. 3.

COMPOUND INTEREST IS NOT ALLOWABLE, in general, except upon a settlement of accounts between the parties after interest has become due, or upon an agreement for that purpose subsequent to the original contract, or upon a master's report in chancery, after confirmation, in which the amount of principal and interest has been computed: *Connecticut v. Jackson*, 7 Am. Dec. 471; *Van Benschooten v. Lawson*, 10 Id. 333. But see *Gibbs v. Chisolm*, 10 Id. 560; and on the subject of interest generally, see the note to *Selleck v. French*, 6 Am. Dec. 188.

CALLOWAY v. MIDDLETON.

[2 A. K. MARSHALL, 372.]

ALL WHO REPEAT A SLANDER ARE RESPONSIBLE therefor, and general reports previously in circulation to the same effect are no justification, although they are admissible in mitigation of damages as extenuating malice.

APPEAL from the circuit court. The opinion states the case.

Bibb, for the appellant.

Crittenden, for the appellee.

By Court, BOYLE, C. J. This was an action brought by Middleton and wife against Calloway, for uttering and publishing slanderous words, importing a charge that Mrs. Middleton had, before her marriage, had a mulatto child. Calloway pleaded not guilty, and justified, on the ground that the words were true.

On the trial of the cause the plaintiffs proved by two witnesses, that Calloway had said there was an old report in circulation in the neighborhood when he came there, that Mrs. Middleton had had a mulatto child before she was married, and that she was the mother of Harry Butcher's wife, who is alleged to be a free man of color, and his wife a mulatto; but that Calloway did not pretend to know it, or speak of it as a fact, but as a report. By one witness the plaintiffs proved that Calloway said he had some reason to believe that Harry Butcher's wife was Mrs. Middleton's child, and gave as his reason for so saying, that he had heard it from Mrs. Stuart, and other respectable persons and old settlers. By another witness, the plaintiff proved that Calloway, the fall before the trial, said Middleton, the plaintiff, was a damned rascal and had sold his wife's children; and that being asked by the witness what he meant, he turned to Harry Butcher, who happened to be present, and asked the witness if he knew Butcher's wife; and the plaintiffs proved by one or two witnesses that they had heard Calloway call Harry Butcher, Tom Middleton's son-in-law; and several of the witnesses, on cross-examination stated, that the report that Mrs. Middleton was the mother of Harry Butcher's wife, had prevailed in the neighborhood years before Calloway came to it. After the plaintiffs had produced the foregoing evidence and proved by a number of witnesses Mrs. Middleton's general good character, and the improbability of her being the mother of Butcher's wife, from her age, and other circumstances of the latter, Calloway called several witnesses, of one of whom he inquired

whether the report spoken of by him was not generally known and spoken of in the neighborhood a number of years ago, and whether such report was not in circulation. To the witnesses answering these interrogatories the plaintiffs objected, and the court sustained the objection, and excluded all evidence of such a report. The defendant then offered to prove by a witness that Mrs. Middleton was generally reputed by all the neighbors, fifteen or twenty years ago, to be the mother of Harry Butcher's wife, but the plaintiffs objected to the evidence and the court sustained the objection.

To these several opinions the defendant, Calloway, excepted, and a verdict of one thousand dollars having been found against him, and judgment thereon rendered, he has appealed to this court.

Whether the evidence offered by the defendant and excluded by the court, was admissible or not, is the only question which need be decided.

It is perfectly clear that the previous existence of the slanderous report, or the general reputation of the fact, could not amount to a justification of the defendant in reiterating the charge; for every one who gives currency to a slanderous report becomes responsible for its truth, and most certainly neither general report nor general reputation is admissible evidence of the truth of a particular fact. But malice is the gist of the action of slander, and the degree of responsibility of one who publishes slanderous words must be proportioned to the malignity of the person who utters a slander, though not evidence of its truth, must lessen the degree of his responsibility; and, most indisputably, one who only gives currency to a report already in existence, cannot be guilty of the same degree of malignity as one who is the prime author or original fabricator of the slander.

The evidence, therefore, of the previous existence of the slanderous report in question, in this case, though not amounting to a justification of the defendant, was admissible in mitigation of damages.

The weight of such evidence, and the extent to which it should operate to mitigate the damages, must depend upon the circumstances of the case, and on matters properly and exclusively belonging to the jury to determine, but cannot affect the question of its admissibility. See the case of *Kennedy v. Gregory*, 1 Binn. 85; and the case of *Morris v. Duane*, Id. 90; in both of which cases a similar question occurred, and was decided in the same way.

The judgment must be reversed, with costs, and the cause remanded, that a new trial may be had, not inconsistent with the foregoing opinion.

ADMISSIBILITY OF GENERAL REPORTS.—It was held in *Alderman v. French*, 11 Am. Dec. 114, that prior reports of the plaintiff's guilt of the crime imputed to him are not admissible in an action of slander, under the general issue, in mitigation of damages. See the note to that case.

TRIMBLE v. COONS.

[2 A. K. MARMON, 375.]

PARTNER EXHIBITING SEALED INSTRUMENT.—A partner has no power to bind his copartner by an instrument under seal, without special authority.

APPEAL from the circuit court. The opinion states the case.

Bibb, for the appellant.

By Court, *MILLS*, J. The plaintiff in the court below, now appellant, declared in covenant against John Coons and William Ellis, only, on a writing signed thus: "John Coons (seal), William Ellis and Brothers (seal)."

The defendant Coons, pleaded in abatement, after craving oyer of the writing, that, "at the time of making the several supposed covenants in the declarations mentioned, the said Coons was a partner in the trade of salt-making with William Ellis, Hezekiah Ellis, Walter Ellis, and Charles Ellis, who are yet living, to wit: the said Walter Ellis and Charles Ellis, in Montgomery county and circuit, William Ellis, in Fayette county, and Hezekiah Ellis, out of this commonwealth, and the said several covenants in the declaration alleged, were made jointly by the defendant, John Coons and the said William Ellis, who covenanted jointly for himself and brothers, who are the aforementioned parties."

To this plea the plaintiff demurred, and the defendant joined in the demurrer. The court below gave judgment against the demurrant, and supported the plea, from which decision the plaintiff appealed; and the validity of the plea is the only question involved in the assignment of error.

It is a well settled principle, that one partner, by virtue of the authority given him by the mere fact of partnership, can-

not bind his partner by a sealed instrument, and that additional authority, granted by seal, is necessary to authorize such an act. In the plea in question, it is not averred or pretended that the other partners executed the instrument, or that those who did had sufficient authority to bind them, but barely that they covenanted for and on behalf of the other partners, as well as themselves. This could not authorize the plaintiff to bring suit against the partners who were not sued. His right of action existed against those who had actually executed the covenant in proper person, or by another having competent authority.

From these principles, it results that the plaintiff had rightly commenced his action, and that it ought not to have been abated, because he did not sue others, whom he had no right to sue, and that the court below erred in abating the suit.

The judgment, therefore, must be reversed with costs, and the cause remanded, with directions to that court to sustain the demurrer, and render judgment of *respondat ouster* against the defendant

POWER OF PARTNER TO AFFIX SEAL.—That a partner has no power, without special authority, to bind his copartner by an instrument under seal, see *Morgan v. Scott*, *ante*, 37, and note thereto.

McCLANAHAN v. HENDERSON.

[2 A. K. MARSHALL, 383.]

AN ADVERSE CLAIM PURCHASED BY A TRUSTEE inures to the benefit of the *cestui que trust*. Hence, where one holding a tract of land, one half to himself, and one half as trustee for another, buys in an adverse claim, the latter is entitled to the benefit of half of such claim, and is liable for half the purchase-money and interest.

RIGHT OF TRUSTEE TO RELINQUISH CLAIM.—Where one holds land, one half for himself and one half in trust for another, if he relinquishes to an adverse claimant any part of the land, he must either show the superiority of the adverse title, or submit to have the land relinquished taken out of his own moiety.

A DEED IMPLIES A CONSIDERATION, and, if unexpressed, it may be shown by parol what the consideration was.

RIGHTS OF TRUSTEE AS TO IMPROVEMENTS.—Where one holds land, one moiety for himself and one moiety as trustee for another, he is entitled to be reimbursed one half the amount expended in improvements, and is liable for one half the rents.

APPEAL from the circuit court. The opinion states the case.

Bibb, for the appellants.

Hardin and Tulbot, for the appellees.

By Court, *BOYLE*, C. J. Wilcoxon having obtained a certificate for a settlement and pre-emption, assigned the same to McClanahan, who gave his bond, conditioned to convey to Wilcoxon one half of the land that should be obtained thereby. This bond Wilcoxon assigned to Henderson, who gave his obligation to convey to Wilcoxon all the land that should be obtained in virtue thereof above four hundred acres. McClanahan caused entries and surveys to be made of the settlement and pre-emption, and obtained patents therefor in his own name. A part of the land he lost by a decree, in a suit brought against him by Whitledge, and he relinquished part to Waits, whose claim interfered, and there being also an interference with a pre-emption in name of Keller McClanahan, purchased up part of it, at the rate of fifty pounds per hundred acres. In the meantime, Henderson, having departed this life, his heirs brought this suit against McClanahan, to compel a division of the land, and McClanahan having died, the suit was revived against his heirs and devisees. Pending this suit, one of the devisees procured an assignment of the bond given by Henderson to Wilcoxon, for all the land Henderson should obtain above four hundred acres, and agreed that the other devisees should be entitled to the benefit of the bond.

In this state of things, the cause came on to be heard, and the circuit court pronounced an interlocutory decree, directing the whole of the settlement and pre-emption to be divided into two equal moieties, each moiety to contain an equal quantity of safe land; that the quantity relinquished to Waits, so far as it was not within the interference and recovery by Whitledge, should be included in the moiety to be allotted to the defendants, and be considered as safe land; that the complainants should be entitled to the benefit of the purchase of Keller's claim, not exceeding one half, and should pay therefor in proportion to the part thereof which should be allotted to them, the price given by McClanahan, with interest; that the defendants should convey to the complainants four hundred acres of the safest of the moiety allotted to the complainants, retaining the residue in virtue of the bond given by Henderson to Wilcoxon; and that the defendants should pay rents and receive a compensation for the improvements upon the part conveyed by them to the complainants. Commissioners were appointed to

make the division and to value the rents and improvements, in pursuance of the interlocutory decree, and having made a report accordingly, a final decree was thereupon entered up, from which the defendants have prosecuted this appeal.

The first question which seems material to be investigated is, whether the complainants are entitled to the benefit of the purchase of Keller's claim, and upon what terms?

This is the most important point in the case, inasmuch as Keller's claim covers a considerable part of the land in contest, and from the proofs and exhibits in this cause is the best claim.

McClanahan must unquestionably be considered as a trustee for Wilcoxon, or his assignees, to the extent of a moiety of Wilcoxon's settlement and pre-emption; and considered in the character of a trustee, he cannot, consistently with the principles of good faith, be allowed to create in himself an interest in opposition to the interest of his *cestui que trust*. Upon this ground, the English chancellors have held that a trustee cannot become the purchaser of that which he holds in trust; and that in general whatever a trustee does for the advantage of the trust estate shall accrue to the benefit of the *cestui que trust*. Thus, if a trustee or executor compound debts or mortgages, or buy them in for less than is due on them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it. So, if a trustee obtain the renewal of a trust term, such renewal shall be for the benefit of the *cestui que trust*: Fonb. 187, note r. and the authorities there cited.

It follows, therefore, that the complainants are entitled equally with the defendants to the benefit of the purchase of Keller's claim. But upon what terms ought they to be permitted to participate in this benefit? The circuit court determined that they should do so upon paying the purchase-money with interest, of the proportion of the claim of Keller, which should be allotted to them; and less than one half of it having been allotted to them, they were, of course, decreed to pay less than one half of the purchase-money. This, we apprehend, cannot be justified upon principles of equity; for the purchase being the means of securing more safe land, subject to the division between the parties, the complainants would be thereby entitled to more in the same proportion; and whether more or less of Keller's claim was allotted to them, there could be no difference in the amount of the benefit to be derived from the purchase, for if more was allotted to them of that, they

would be entitled to less of the residue; and if less than that was allotted to them, they would be entitled to more of the residue; so that, in any mode of making an equal division, the complainants would be as much benefited by the purchase as the defendants; and as the benefit is equal, the burden of paying for it should be so, according to the maxim "*qui sentit commodum sentire debet et onus*." The circuit court, therefore, erred in not compelling the complainants to pay one half the purchase-money given by McClanahan for Keller's claim, so far as it interferes with Wilcoxon's settlement and pre-emption.

The next question thought material to be considered is, whether the circuit court erred in directing the part of the land relinquished by McClanahan to Waits to be considered as safe land, and included in the defendant's moiety. The defendants allege that the relinquishment was executed in consequence of an agreement with Waits to abide the event of a suit between him and Whitlege, in which Waits succeeded. But there is not a particle of proof in support of this allegation; and being destitute of proof it must be considered as unfounded. Had Waits's claim been a valid one, McClanahan might have been compelled by suit to have relinquished; and what he was compelled to do he might have done without compulsion. But Waits's claim is wholly unsupported; and the deed of relinquishment to him by McClanahan must, therefore, be considered as made without any just cause, and ought not to affect the right of the complainants. The argument that the deed of relinquishment was without consideration, and was, therefore, ineffectual to transform the right of McClanahan to Waits, cannot avail the defendants. Whether a consideration be necessary to make the deed valid, is a point we do not think material to decide; for the law, from the solemnity of the instrument, implies a consideration; and though none be expressed in the deed, it may be supplied by averment. But whether the deed be effectual or not, to transfer McClanahan's right is immaterial, as it regards this case; for if it be not effectual to pass the right, the land is in fact safe; and if it be effectual to pass the right, as the deed was made without any apparent cause which can effect the right of the complainants, the defendants can have no just ground to complain that the land should be considered as safe, and be allotted to them. The decree, therefore, is in this respect correct.

The only remaining question which we deem material to be considered relates to the subject of the rents and improve-

ments. On the one side it is contended that the defendants are not entitled to a compensation for the improvements; and on the other it is urged that the complainants are not entitled to the rents and profits. But neither of these positions, we apprehend, can be sustained. In equity the defendants must be considered as tenants in common with the complainants; and thus considered they had an equal right to each and every part of the whole tract. Their possession must, therefore, be deemed rightful, and the improvements made by them on the land, which has by the partition been allotted to the complainants, having accrued thereby to the benefit of the complainants, they ought to compensate the defendants therefor.

On the other hand, if they are bound to pay for the improvements, because by partition and allotment those improvements have accrued to their benefit, it follows, as a necessary consequence, that they are entitled to receive the rents and profits, at least as far as to allow them a set-off against the value of the improvements to the extent of the rents and profits, and it is only to that extent the circuit court has decreed.

As to the rents and improvements, therefore, as well as to the partition directed by the circuit court, the decree is correct. But that court having erred in not compelling the complainants to refund, with interest on one half of the money paid by McClanahan for Keller's claim, so far as it interfered with Wilcoxen's settlement and pre-emption, the decree as to the amount directed to be paid by the complainants must be reversed with costs, and the cause remanded, that a decree may be entered according to this opinion.

A rehearing having been granted, the cause was reargued and the following opinion delivered June 17, 1820:

By Court, BOYLE, C. J. We are still of opinion that McClanahan must be considered as a trustee for Wilcoxen and his assignees in making the purchase of Keller's claim, so far as it interfered with Wilcoxen's settlement and pre-emption, and that Wilcoxen and his assignees, to entitle themselves to the benefit of the purchase, should pay one moiety of the purchase-money, with interest, whether more or less than a moiety should be allotted to them in the division.

The court below had adopted the principle of requiring the complainants to pay only for that portion of Keller's claim which should be allotted to them, and less than a moiety of Keller's claim having been allotted to them by the division decreed by

that court, we had supposed that the complainants were decreed to pay less than they had been required to pay, and upon that ground alone the decree was reversed.

Upon farther reflection, however, we perceive we were mistaken in the supposition that the complainants ought, according to the principles of the former opinion, be compelled to pay a moiety of the purchase-money paid for Keller's claim. For the defendants themselves represented Wilcozen as to three sevenths of his half of the settlement and pre-emption, and the complainants are, in truth, the assignees of only four sevenths, and have obtained a decree for no more. Upon the principles, therefore, adopted in the former opinion of this court, the complainants could have been decreed to pay only four sevenths of half of the purchase-money paid by McClanahan for Keller's claim. And it appears that they were in fact decreed to pay two hundred and forty-one acres, which was more than four sevenths of the one half of Keller's claim purchased by McClanahan within the interference with Wilcozen's settlement and pre-emption, so that the defendants, on that ground, have no cause of complaint.

The former decree of this court, so far as it reverses the decree of the circuit court, must be set aside and held for nought, and the decree of that court must be affirmed with costs.

RIGHT OF TRUSTEE AS TO IMPROVEMENTS.—A trustee to sell land to raise money to pay off incumbrances, etc., will not be allowed for improvements made in good faith in building houses and mills, clearing lands and making roads, but only for necessary repairs: *Green v. Winter*, 7 Am. Dec. 475.

PAROL EVIDENCE AFFECTING CONSIDERATION.—Upon this point see *Chiles v. Coleman*, ante, 396, and cases cited in the note thereto.

CONN v. MANIFEE.

[2 A. K. MARSHALL, 396.]

DEED, WHERE RECORDED.—A deed of land lying in two counties may be recorded in either.

DEED BY GRANTOR OUT OF POSSESSION.—Under the act of 1798, a deed of bargain and sale of land held adversely by another, conveys the title, and the purchaser may maintain a writ of right without having been actually seised.

A RELEASE, purporting to have been made on valuable consideration, and containing words sufficiently comprehensive, will operate as a deed of bargain and sale.

AM. DEC. VOL. XII—37

APPEAL from the circuit court. The opinion states the case. *Pope and Talbot*, for the appellants.

Wickliffe, for the appellee.

By Court, OWSLEY, J. This was a writ of right brought by the present appellants to recover that part of a tract of land of two thousand one hundred and ninety-six acres, patented in the name of Thomas Conn, deceased, which is claimed by the appellee under the adverse claims of Isaac Ruddle and Mounce Bird. The issue was joined on the mere right, and the appellants proved they were the heirs and legal representatives of Thomas Conn, deceased, and produced a patent dated in 1783, from the commonwealth of Virginia, to their ancestors, for the land, and proved that the patentee, in 1784, settled upon the tract, claiming it as his own, made lasting and valuable improvements, and continued to reside thereon until the time of his death, but that his settlement and improvements did not interfere with the claims of Ruddle.

The appellee, Manifee, then proved that Ruddle, under whom he claims, in March, 1788, claiming the whole of Ruddle's pre-emption, but the patent of which is junior in date to the patent of Conn, settled and remained thereon until his sale to Manifee, in 1794, at which time Manifee took the possession and has continued the same ever since. Both patents, that of Conn, under which the appellants claim, as well as that of Ruddle, under which the appellees claim, were admitted to include the land in contest. The copy of a deed of bargain and sale, taken from the records of the county court of Scott, and purporting to be made in June, 1804, by the ancestor Thomas Conn, deceased, to the appellant, John Conn and Flournoy, for the tract of land patented to the said Thomas, was introduced, but its admission was objected to by the appellants on the ground of the clerk having no authority to record the deed in the county of Scott, where but part of the land lies; but the objection was overruled, and the deed read in evidence.

A deed from Flournoy and John Conn, bearing date in 1807, to the said Thomas Conn, deceased, purporting to release to the latter all the interest which the former acquired under the deed to them of 1804, was also given in evidence, and it was also proved that the possession of the land conveyed was never given by Thomas Conn to Flournoy and John Conn. The residence of the appellee upon the land, at the date of the writ, was also admitted, and evidence being closed, and not contested by

either party, the court on the motion of the appellee, instructed the jury that the demandants could not recover any part of the land in contest.

A verdict was, accordingly, found for the appellee, and judgment rendered thereon against the appellants, and to reverse that judgment they have prosecuted this appeal. In reviewing the judgment of the circuit court, we shall assume the decision of that court correct, in admitting the copy of the deed from Thomas Conn to Flournoy and Conn in evidence. Part of the land is admitted to lie in the county of Scott, and, by the act of 1798, 2 Littell, 262, deeds may be recorded in any county where the land or any part thereof lies.

With respect, however, to the appellants' right to recover the land, the main matter in contest between the parties, we cannot accord in opinion with the circuit court. Were it not for the deed of Thomas Conn, deceased, to Flournoy and Conn, of 1804, a doubt could not exist against the appellant's right. Before the execution of that deed, by uniting the actual seisin of the land with its title derived under the elder patent from the commonwealth, the decedent, Thomas Conn, became invested with a perfect right, and in the absence of that deed, it is admitted by the parties that the appellants, claiming as his heirs, might, upon his seisin, and under his right, maintain their writ of right.

But it is contended that, by the deed of 1804, the title of Thomas Conn, deceased, was transferred to Flournoy and John Conn, so that he could not thereafter have maintained a writ of right, and it is urged that as respects the land now in contest, adverse possession thereof being in the appellees, the subsequent deed, purporting barely to release the interest of Flournoy and Conn to Thomas Conn, cannot have revested any interest therein to Thomas, but if the deed of release conveys anything, it is insisted, that Thomas Conn, claiming under it, must be viewed as a purchaser from Flournoy and Conn, and, as such, could not, in his life-time, without previously entering upon the land, have maintained a writ of right, and as no such entry is proven, it is inferred the appellants, claiming through him ought not to recover.

It should be recollected that the possession held by the appellee, at the date of the release, had been acquired several years previous to the date of the deed from Thomas Conn to Flournoy and Conn, so that if the possession was adverse when the release was executed by the latter, it must have been so

when the deed was given by the former. Considering the appellees' possession adverse, therefore, it follows, upon common law principles as well as under the statute against champerty and maintenance, in force in this country until the passage of the act of 1798, 2 Litt. 230, that the deed from Thomas Conn passed no title to Flournoy and Conn.

But by the act of 1798, purchases of interest or claims to land held under the laws of Virginia are permitted; and according to the decision of the supreme court of the nation, in the case of *Walden v. The Heirs of Gratz*, 1 Wheat. 292, the title will not only pass, by a deed executed since the passage of the act, but a suit may be also maintained in the name of the vendee. If, therefore, by the deed from Thomas, the title, under the act of 1798, passed to Flournoy and Conn, so, we apprehend, by force of the act, Thomas must, by their deed to him, have again become invested with the title. Supposing the appellee to have had the adverse possession, it is true the latter deed, in strict propriety, cannot be said to pass the title as a deed of release, but though inoperative as a deed of release, yet as it purports to have been made upon consideration of value, and contains words sufficiently comprehensive, it must be construed to operate as a deed of bargain and sale.

Whether, therefore, the operation of those deeds be considered with or without the statute of 1798, it equally follows they cannot prevent the appellants from maintaining their writ of right. Considered without the statute, as in that case the deed from Thomas Conn would be inoperative, the title must be supposed still residing in him, and consequently his heirs, after his decease, were entitled to their writ; and, considered under the statute, upon the supposition of the decision of the supreme court, in the case cited from Wheaton, being correct, the heirs must also be entitled to their writ. For if, as was held in that case, land may, since the statute, be sold and conveyed whilst in the adverse possession of others, so as to pass the title and enable the alienee to maintain an ejectment, we apprehend the statute must be construed to authorize the purchaser of such a claim, without entering upon the land, to maintain any action for its recovery which could have been maintained by the vendor. The statute is general in its provisions, and authorizes the purchase of every description of interest, whether legal or equitable, to lands held under the land laws of Virginia; and to require of the purchaser an actual entry to enable him to maintain a real action for the

recovery of land of which his vendor had been actually seised, would be imputing to the makers of the statute—what cannot for a moment be supposed—an intention to provide for the sale of interests in lands, by a mode of conveyance which might be effectual to pass the right from the vendor, but which, at the same time, would not clothe the vendee with such an interest as could enable him, by any legal means, to assert his right; thus, for example, there may be a disseisin of lands held under the laws of Virginia, and the disseisor may have continued in possession, claiming the land as his own, for twenty years; by the lapse of time the disseisor's right to enter is tolled; he could not, therefore, regain the possession by entry, but, having been once actually seised, might maintain a writ of right. But if the alienee of the disseisee were not permitted before entry to maintain such a writ, it is plain, the conveyance, although effectual to pass the right from the vendor, would not furnish the vendee with the means of asserting the right. The right could not be asserted in the name of the vendor, because, by the conveyance, all the interest with which he was invested is transferred to another, and the vendee could not maintain an ejectment in his own name, because, to maintain that action, he must show a right of entry, and the vendor's right of entry being tolled by the lapse of time, the vendee could not, under the conveyance, acquire such a right; he could not acquire the actual seisin by entering upon the land, because his right of entry, owing to the lapse of time, is forbidden by law; and he could maintain no other real action, because the same kind of seisin is necessary to maintain other real actions as is required to maintain a writ of right.

Upon the whole, we are of opinion the appellants have shown themselves entitled to maintain their writ, and the circuit court consequently erred in its instructions to the jury. The judgment must therefore be reversed, with costs, the cause remanded, and further proceedings had not inconsistent with this opinion.

DEED WHERE RECORDED.—Where the boundaries of a county are changed after the making of a deed, and before it is recorded, it must be recorded in the county in which the land lies at the time of recording, and not in the county in which the land lay at the date of the deed: *Garrison v. Haydon*, 1 J. J. Mar. 222.

CONVEYANCE BY ONE OUT OF POSSESSION.—The construction here given to the statute of 1798, allowing sales of land in the adverse possession of another, and transferring the grantor's right of action to the grantee, is affirmed in *Young v. Kimberland*, 2 Litt. 223, and *Aldridge v. Kincaid*, Id

292. It is now provided, however, by statute in Kentucky, with certain exceptions, that all sales or conveyances, including those made under execution, of any lands, or the pretended right or title to the same, of which any other person, at the time of such sale, contract, or conveyance, has adverse possession, shall be null and void: *Swager v. Crutchfield*, 9 Bush. 411. This statute was enacted in 1852, but is substantially the same as the one enacted in 1824, and the decisions made under the former act are applicable to the construction of the present one. The law, as it now stands, in that state, is substantially the same as the familiar rule of the common law: *Jackson v. Demont*, 6 Am. Dec. 259.

BARGAIN AND SALE.—As to what is necessary to constitute a deed of bargain and sale, see *Cheney v. Watkins*, 2 Am. Dec. 530, and *Jackson v. Sebring*, 8 Id. 357.

SHACKELFORD v. PURKET.

[2 A. K. MARSHALL, 435.]

A SUBMISSION to ARBITRATION BY BOND, without an order of court, is not within the statute, and must be tested by common law principles.

A DISPUTE CONCERNING LANDS IS ARBITRABLE, at common law, and the award is conclusive upon the parties as to every point within the submission.

AN AWARD IS EVIDENCE of every fact the decision of which is clearly implied in such award, although not expressly stated to have been decided.

A SUBMISSION OF "ALL MATTERS IN DISPUTE" is sufficiently definite to sustain an award.

APPEAL from the circuit court. The opinion states the case.

Crittenden, for the appellant.

Bibb, for the appellee.

By Court, OWSLEY, J. This was an ejectment brought by Shackelford to recover from Purket a tract of land containing about two hundred acres, known by the name of the Garden place, the title whereof was arrested by the former, under a deed conveyance executed to him by the latter.

The ejectment was commenced in June, 1817, and the trial had in September, 1819.

On the trial, the plaintiff produced and read in evidence to the jury, a deed of conveyance given to him by Purket, for the land in contest, and bearing date the thirteenth of December, 1816. The defendant then introduced evidence conducing to prove that the deed was obtained by fraud and unfair practices. The plaintiff thereupon offered in evidence the following arbitration and submission bond and award, made in pursuance thereof, to wit:

"We, William Shackelford and Ephraim Purket, agree to submit all matters in dispute between us, with respect to the Garden place, for which said Ephraim made a deed to said William, on the thirteenth December, 1816, and all other land contracts, and all other dealings and contracts, to the arbitration and final determination of David Maxwell, Robert W. Lewis, John Rowntree, William Smith, and Robert Wallace, and their award to be a final determination between the parties; and the parties not to be permitted to proceed further, either in law or equity; the arbitrators to meet at the Dripping spring, on Thursday next; and if any three of said arbitrators shall meet, they are to decide the above controversy, in place of the five; and to decide the said controversy, both as to law and equity. We, and each of us, bind ourselves in the penalty of five thousand dollars; and if said arbitrators shall decide in favor of said William, said Ephraim shall give possession of said Garden place immediately. Witness our hands and seals, this fourteenth day of July, 1817: William Shackelford [seal]; Ephraim Purket [seal]."

"We, the arbitrators of the within bond, after hearing the evidence for each of the within-named Ephraim Purket and William Shackelford, are of opinion, that Purket has produced no evidence; therefore say, that said Shackelford has a complete legal and equitable title to the said two hundred acres of land, the Garden place, now in dispute; and that the said Purket give the said Shackelford immediate possession of the same: Robert W. Lewis, John Rowntree, D. Maxwell, Robert Wallace."

"We, David Maxwell, Robert Wallace, Robert W. Lewis, and John Rowntree, arbitrators chosen by William Shackelford, and Ephraim Purket, to settle their matters in dispute concerning their land contracts, and more particularly concerning the two hundred acres of land on which said Ephraim Purket now lives, called and known by the Garden place, and which was conveyed by the said Ephraim Purket to said William Shackelford on the thirteenth of December, 1816. We, the aforesaid arbitrators, having met at the Dripping spring, at the house of David Maxwell, on Thursday the sixteenth of January, 1817, and after hearing the parties, William Shackelford and Ephraim Purket, they being present, do award and determine, that on the thirteenth day of December last, said Ephraim Purket made a deed of conveyance for the two hundred acres of land on which said Ephraim now lives on Sinking creek, called and

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known as the Garden place; and do further award and determine that said William Shackelford holds the legal and equitable title to said two hundred acres of land, and that Ephraim deliver said William possession of said land and premises within ten days. D. Maxwell, Robert Wallace, John Rowntree, Robert W. Lewis."

The defendant admitted the arbitration bond to be his act and deed, and that the award was duly made by the arbitrators, as it purports, and that he had notice and was present at the meeting of the arbitrators and making out their award, and that the tract of land called the Garden place in the deed of submission and award, is the same tract of land in the deed of conveyance described, and for which this suit was brought. The plaintiff offered to prove by two witnesses present in court, that in deciding the matters in reference and upon their award, the arbitrators took into consideration the charges of fraud, circumvention, and unfairness, alleged by the defendant to have been practiced by the plaintiff in obtaining the deed of conveyance, and decided thereon.

But the defendant objected, as well to the submission and award going in evidence, as to the introduction of witnesses to prove the arbitrators took into consideration and decided upon the fraud and circumvention alleged to have been practiced by Shackelford in obtaining the deed, and his objections were sustained by the court, and neither allowed to go to the jury.

A verdict was consequently found for Purket and judgment rendered thereon by the court, and from that judgment Shackelford has appealed. The assignment of errors questions each opinion given by the court in excluding the evidence offered by Shackelford.

We shall examine these opinions in the order they occurred in that court, but preliminary to that examination, it may not be improper to premise that the submission was made in pursuance of no statutory provision of this country, but was entered into by writings under the hands and seals of the parties, without causing it to be made an order of court. Neither the submission nor the award, therefore, can derive aid from any statute, but must be considered as if there were no legislative enactment upon the subject, giving them that operation and effect to which they may be entitled according to the rules and principles of the common law.

With these remarks we will proceed to inquire whether or

not the submission and award ought to have been permitted to go in evidence to the jury? That, at common law, the award of arbitrators, regularly made, and in relation to a matter which might be submitted, is conclusive between the same parties in a contest involving the same matter, is a proposition too well settled to need illustration by the citation of authorities. In actions admitting of special pleading the award is conclusive as a bar; and in cases not admitting of special pleading, it is conclusive as evidence. Whether or not a contest, relating to the title of land is, at common law, an arbitrable matter, was anciently a question of doubt; but in latter times those doubts have been dispelled, and it is now settled that such a contest may be determined by arbitration.

The decision of arbitrators, it is true, cannot convey the title of land, but an award upon the title is binding upon the parties, and estops the plaintiff, or defendant, from disputing the title affirmed by the award. And hence it is said that, although an arbitrator cannot convey land from one to another, but can only order it to be done; yet if he determine the right to be in one, this is conclusive evidence of the title, and cannot be disputed in an action of ejectment; Peak. Ev. 77. The correctness of this doctrine appears not to have been denied by the circuit court, but from the bill of exceptions contained in the record, that court seems to have entertained the opinion, and excluded the submission and award on the idea that to be admissible to disprove the fraud alleged to have been committed by Shackelford, in procuring the deed of conveyance from Purket, the purpose for which they were offered, the award should show upon its face that the alleged fraud had been decided on by the arbitrators.

This court cannot admit there exists any necessity for an award to contain statements of all the points decided by the arbitrators. To be evidence of any particular fact, the award should no doubt be sufficiently comprehensive to imply a decision of it; but that which may be fairly implied is equivalent to an express allegation of it.

That the award offered in evidence implies a decision of the question of fraud, we apprehend there is little room to doubt. It contains an express decision of the legal and equitable title to the land being in Shackelford. Fraud vitiates all contracts, and if committed by Shackelford in obtaining the execution of the deed, neither the legal or equitable title can be said to have passed to him. In awarding the legal and equitable title,

therefore, the arbitrators must be supposed to have decided on every matter implied in the validity of such a title, and which came within the power given them by the terms of the submission; and as the fraud alleged to have been committed by Shackelford is incompatible with both the legal and equitable title, the award fairly implies that, in the opinion of the arbitrators, it was not committed.

If, by the terms of submission, the arbitrators were not empowered to decide on the question of the fraud, their having so decided, it will be conceded, ought not and cannot conclude the parties; but we suppose the terms of submission are sufficiently comprehensive to authorize an inquiry into that matter. It purports to refer to the decision and final determination of the arbitrators, all matters in dispute between the parties, as to the title of the land conveyed by Purket.

Whether or not the question of fraud was a matter then in dispute, the deed of submission affords no certain information; but the parol evidence which was rejected by the court, was offered to prove that the question of fraud was then disputed; so that we are brought to examine the correctness of that decision, which excludes the parol evidence. We think the evidence ought to have been admitted.

Without the aid of parol evidence, it would be impossible to sustain a general submission of all matters in dispute. For, as the submission contains no suggestion of the matters disputed, it must be inoperative unless those matters can be ascertained by matters extraneous from the submission; for it is plain no defect in the submission, the mere act of the parties can be explained by anything contained in an award—the act of the administrators; and there is nothing else but parol evidence which can be resorted to for the purpose of supporting the submission.

We know of no case where a submission of all matters in dispute has ever been held insufficient—but to the contrary it appears well settled that a submission of all injuries, or of all matters between the parties, or of all debts and demands, or of all matters in difference, will sustain an award made thereunder: 1 Bac. Abr. 211.

Upon the whole, we are of opinion the evidence ought to have been permitted to go to the jury, and that the court erred in excluding it. The judgment must therefore be reversed, with costs, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

A submission of "all accounts and other matters respecting property of every nature whatever," was upheld in *King v. Cook*, 4 Am. Dec. 715, and was decided to include all matters between the parties not only as individuals, but also as guardians and trustees. All the arbitrators must meet and act, although a majority may be empowered to decide: *Moore v. Erving*, 1 Am. Dec. 195, and note.

HARDIN v. CUMSTOCK.

[2 A. K. MARSHALL, 480.]

WORDS UTTERED IN A REGULAR COURSE OF JUSTICE, however defamatory, are not actionable.

IF AN ATTORNEY INSERTS SLANDEROUS MATTER in the pleadings, without his client's direction, the latter is not responsible.

APPEAL from the circuit court. The opinion states the case.

Hardin, for the appellant.

Bibb, for the appellee.

By Court, OWSELEY, J. This was an action on the case brought by Hardin against Cumstock in the circuit court. The declaration charges, that Cumstock, desirous of defaming and injuring Hardin in his good fame and reputation, and expose him to the pains and penalties against robbery, by his attorney, William Allen, did falsely and maliciously issue against Hardin, a writ in behalf of himself, Cumstock, from the clerk's office of the Breckenridge circuit, in an action of assault and battery, and in said writ, falsely and maliciously charged said Hardin of robbing him, Cumstock, of five hundred dollars in silver, and did falsely and maliciously utter and publish the contents of said writ, in the presence of divers good citizens of this commonwealth, etc. To this declaration Cumstock pleaded not guilty, and issue was joined thereon.

On the trial, Hardin read in evidence the following memorandum for a writ: "Cumstock against Hardin, trespass, *vi et armis*, assault and battery, false imprisonment and robbery, damage two thousand dollars, no bail required. Allen." And also read the writ which issued in pursuance thereof, and which required Hardin to answer Cumstock in a plea of trespass, *vi et armis*, assault and battery, false imprisonment and robbery. And produced in evidence the declaration thereon, containing a recitation of the action, in strict accordance to the memorandum and writ; and, moreover, charges Hardin with assaulting, beating and wounding Cumstock, and taking from him five hundred

dollars in silver, etc. Whereupon Cumstock introduced and proved by Allen that Cumstock employed him to bring an action against Hardin for assault and battery; that he made the memorandum for robbery, without the directions of Cumstock; and that he also filed the declaration in that way, without his directions.

Upon this evidence, upon motion of Cumstock, the court instructed the jury, that if they believed the evidence, they ought to find for him. Exceptions were taken to the opinion of the court, and the evidence made part of the record. Under the instructions of the court, a verdict was found for Cumstock, and judgment thereon rendered against Hardin; and from that judgment Hardin appealed. The assignment of errors involves an inquiry into the correctness of the instructions given to the jury.

From the preceding statement, it will be perceived that no parol evidence was introduced, conducing to show that Cumstock ever uttered or published the slanderous matter charged in the declaration; but, to the contrary, Hardin appears to have rested his cause exclusively upon the evidence contained in the memorandum, writ, and declaration, produced in evidence to the jury; so that in examining the correctness of the instructions given by the circuit court, we are presented with the question, whether or not Hardin's action can be sustained upon the charge of robbery, contained in that writ and declaration; and when, too, that charge is proven to have been made by Allen, without the directions of Cumstock, and under an engagement to commence an action of assault and battery against Hardin.

If the action of assault and battery were prosecuted falsely and maliciously, and without any reasonable or probable cause, there could be no question but an action might be sustained by Hardin; but then the action ought to be in the nature of an action of conspiracy for maliciously suing, and not in the form pursued in the present case.

If the action of Hardin can be sustained in its present form, it must be upon the principle of the writ and declaration containing libelous matter, but we are aware of no case where slanderous matter, charged in a regular course of justice, has ever been held to be libelous.

In the case of *Leak v. King*, 1 Saund. 131, it was held that for printing a false and scandalous petition to a committee of the house of commons and delivering copies thereof to the members of the committee, no action would lie. And in 4 Coke

14, it was held that no action would lie for slanderous words contained in articles of the peace.

The reason assigned for the decision in the former case is, that to deliver copies of such petitions is agreeable to the order and course of parliament, and the reason for the latter determination is, that by exhibiting articles of the peace the party pursued the ordinary course of justice in such case.

In the case cited from Coke, the court, upon the authority of another case from Cro. Eliz. 230, 248, takes a distinction between cases where the court has, and where it has not jurisdiction.

In the case cited from Coke, it appears that Owen Wood exhibited a bill in the star chamber against R. Bushley, and charged him with divers matters examinable in that court; and further, that he was a maintainer of pirates and murderers, and a procurer of murderers and pirates, which offenses were not determinable in the star chamber. Sir R. Bushley brought his action on the case against Owen Wood, and declared that the said Wood had exhibited the said bill charging that the said Bushley was a maintainer of pirates and murderers, and a procurer of pirates and murderers, etc.; and that the said Owen, at, etc., speaking of the matters contained in said bill, in the hearing, etc., of divers persons, etc., said that the said bill and matters therein contained were true, etc. The court resolved that for any matter contained in said bill, which were examinable in said court, no action would lie; but for the words not examinable there, an action on the case would lie.

But the editor of Saunder's reports, in note 1 to the case already cited, in speaking upon the distinction taken by the court in the case of Coke, says, "that the distinction taken between cases where the court has, and where it has not jurisdiction, has been often denied, and in either case no action will lie," and refers to Lutw. 1571, in support of his position.

And Bacon, in his Abridgment, vol. VI., sec. 226, adopts the broad and general proposition "that no action lies for the publication of slanderous words in a course of justice; but if the publication be accompanied with any circumstances of malice, an action on the case in the nature of a writ of conspiracy, may be sustained."

Whether or not this proposition should be admitted, with the exception contained in the distinction adopted by the court in the case in Coke, or generally, as it seems to be supposed by the annotator to Saunders, need not, in the present case, how-

ever, be decided; for in either point of view, we should be of opinion, assuming the evidence to be true, that Hardin has shown no right to recover against Cumstock.

According to the general proposition, it is perfectly clear that the action of Hardin cannot be maintained; and it may be fairly questioned whether the charge of robbery comes within the exceptions.

There can be no doubt of the propriety of uniting in the same action with a charge of assault and battery, that of taking and carrying away the property of the plaintiff. And if a robbery be committed in taking the goods, an action may, nevertheless, be maintained as well for the assault and battery, as for the goods. In such an action, therefore, the robbery might be inquired into, and if so, it would seem to follow that to charge the injury to have been committed under the circumstances with which it was connected, ought not to be deemed out of the regular course of justice, or a charge not examinable before the court.

But were it conceded that, for such a charge as that contained in the writ and declarations, an action might be maintained, still, we should be of opinion the instructions of the circuit court were correct. In such an action malice is the gist of the action; and, without evidence of malice, Cumstock cannot be accountable. And assuming the evidence true, there is no pretext for the imputation of malice to Cumstock in charging the robbery. He appears to have engaged the attorney to prosecute an action for assault and battery, and the robbery is proven to have been charged by the attorney without his knowledge or directions.

The judgment must be affirmed with costs.

THE PRIVILEGE ATTENDING WORDS USED IN JUDICIAL PROCEEDINGS, is discussed in the note to *McMillan v. Birch*, 2 Am. Dec. 431. The law on this subject, in Kentucky, is stated by Chief Justice Marshall in delivering the opinion of the court in *Forbes v. Johnson*, 11 B. Mon. 48. He says: "The principle is well settled and is indeed essential to the ends of justice, which demand that there should be a free resort to judicial tribunals, and to the remedies furnished by the law, that words spoken or written in the course of justice, and pertinent to a legal proceeding within the jurisdiction of the tribunal to which they are addressed, and to the remedy sought in that tribunal, are not actionable, though they be false, unless the proceeding were resorted to merely for the purpose of conveying the scandal and as a cover for the malice of the party, and not in good faith as a remedy for the assertion of a right or the redress of a wrong. The case of *Thorn v. Blanchard*, 5 Johns. 521, and the authorities there cited, fully sustain this po-

sition." Mr. Townshend, however, lays down the doctrine without qualification that an action will in no case lie for defamatory matter inserted in pleadings: Townsh. on Slander and Libel, sec. 221; and that the power of the court to strike out scandalous matter in pleadings, and to punish for contempt, is sufficient to prevent any abuse of the privilege. Words uttered in church trials for breaches of discipline are entitled to the same privilege as those used in regular judicial proceedings: *Lucas v. Case*, 9 Bush, 297.

As to the liability of legislators for words spoken in debate, see *Coffin v. Coffin*, 3 Am. Dec. 189.

RANKIN v. MAXWELL.

[2 A. K. MARSHALL, 436.]

A CONTRACT TO BE SPECIFICALLY ENFORCED must be certain in every part. A BILL IN CHANCERY SHOULD BE SO CERTAIN in setting forth the case as to enable the chancellor to pronounce his decree at once; but if relief is sought on a lost paper, and the complainant mistakes his case, the defect may be aided by the answer.

ALLEGATIONS IN AN UNVERIFIED BILL are not evidence against the complainant.

IF PART OF THE LAND IS LOST, a vendee, seeking specific performance of a contract to convey, will not be compelled to take such part, but may take the safe land and compensation for the residue, or may refuse to take any part and go for compensation for the whole land.

THE MEASURE OF COMPENSATION, if the loss is not imputable to the vendor, is the value of the land at the date of sale, with interest from the time the purchase-money fell due.

CROSS-APPEALS from the circuit court. The opinion states the case.

Pope and Tulbot, for Rankin.

Haggin and Wickliffe, contra

By Court, MILLS, J. Adam Rankin filed his bill in chancery in the court below, alleging that about the year 1784 he purchased, of John Maxwell, a tract of two hundred acres of land, and had received possession from him, and a bond for the conveyance thereof. That afterwards in a suit brought by Maxwell against him, he furnished his counsel, Joseph H. Davies, with the bond, and had never seen it since; that after the death of his counsel his papers had fallen into the hands of others, and after the most strict scrutiny he could not find it. That the bond was for land out of a pre-emption patented in the name of Maxwell, assignee of Patterson. He does not then produce a copy or state its contents from recollection, but proceeds to state that he had likewise, about the same time, pur-

chased a tract of one hundred and sixty acres, or thereabout, from McConnell, who held a pre-emption, also interfering a number of acres with Maxwell's pre-emption; and that having completed his purchase from McConnell, he resided on the land, and the said Maxwell had filed his bill against him, setting up his, Maxwell's, entry on said pre-emption, against McConnell's claim, held by Rankin; and in that suit he was successful; but that during its pendency said Maxwell had filed an amended bill, in which he had acknowledged the existence of the sale and bond, and had stated therein that the land was to be laid off by the bond adjoining the lands of Alexander McConnell and John Campbell; and this is all the account he has rendered in his bill of the contents of the bond, or the shape the land is to assume. In an amended bill he states that the land was to lie on the south-east side of the Hickman road. He then proceeds to state that Maxwell had sold and conveyed parts of the same land to Charles Humphreys and Hallet M. Winslow, and charges that they had notice of his prior purchase from Maxwell. He then prays a conveyance of the land.

Humphreys and Winslow admit that they had knowledge of the purchase of Rankin, but deny that it covers or interferes with them. Maxwell, as well as the other defendants, denies that the purchase or bond of Rankin is as stated in the bill. They admit a purchase and bond for the quantity charged in Rankin's bill out of the same tract, and admit the existence of Maxwell's amended bill in his former suit against Rankin, as set out and sworn by him; but they deny the force of it as evidence against them, because it was not sworn to by Maxwell, and was barely the suggestions of his counsel in that suit, in his absence, and in the absence of the bond itself; but they also confront that amended bill by Rankin's own plea in the same suit, written by his counsel, in which he seems to suggest that his purchase of Maxwell covers the land on which he resides. They also set forth a copy of the bond which Humphreys, the defendant, declares in his answer he drew from the original, having borrowed it from Rankin and returned it to him; and Maxwell swears also in his answer, that it is a correct copy of the original bond, and denies as well as the other defendants, any other contract. Maxwell does not contest the payment of the purchase-money, but alleges it was small, and relies on the antiquity and staleness of the transaction, so far as it respects any other land, but admits his willingness to convey according to the bond. The copy of the

bond thus exhibited, in its condition, describes the land thus: "Two hundred acres of John Maxwell's pre-emption, and part of the land on which the said John now dwells, being part of the lands the said John Maxwell got of Col. Robert Patterson, being the most westernmost part of the said John Maxwell's land." And in that part of the bond which stipulates a conveyance, he binds himself "to make over and convey by deed of general warranty the aforesaid two hundred acres, lying on the most westernmost part of the said John Maxwell's land." This is all the description of the land given by the copy exhibited, and it seems perfectly clear that the boundary has never been demarked.

The parties then went into the production of a quantity of proof, the defendants endeavoring to show that the purchase covered Rankin's purchase from McConnell, where he resides; and the complainant to disprove that fact. On a hearing in the court below, it was decreed that Maxwell should convey the land, as nearly in a square as practicable, to include the spring in the most westwardly part of the tract embraced in the patent. From this decree each party appealed.

It is a well settled principle, that a contract which will be enforced in equity must be certain in all its parts. Applying this rule to the bill of the complainant in the court below, it may well be doubted whether, from its vagueness and uncertainty, it ought not to be dismissed, even if it was taken as confessed and every word to be assumed as true. He has given us no other account of the ground that the bond was to occupy than what he has taken from Maxwell's bill, made part of his bill, and that is, it was to adjoin the lines of McConnell and John Campbell. He has not told us which line of McConnell, when there are two in the interference with Maxwell, nor has he set forth in his bill or made appear in proof anything about the position of John Campbell's line, or indeed shown that such a line in fact existed, when these lines were both necessary to give figure to the land demanded, if it was to lie as he contends for it.

But as every person who attempts to support a bill on a lost writing cannot have it in his power to set forth the contract, as he who has not lost his evidence, and the loss of writings must form a good exception to the rule, which requires every bill to be sufficient on its face to enable the chancellor to pronounce a decree thereon, it would be rather rigid to dismiss the complainant's bill because it is vague and indefinite in the

claim set up, without looking into the answers and seeing whether any aid can be derived from them. An answer may sometimes aid a defective bill. And if this is permitted in any case, it ought to be in one where the complainant has lost the writing on which his claim is based. He may then be permitted to mistake his case materially, and if the disclosure made by the answer should rectify the mistake, but still show that he was entitled to another claim differing in position and extent from that stated in the bill, we see no solid objection against the complainant having relief granted him for that, although he cannot get that which he required in his bill. Applying this rule to the case before us, the answers afford a valid description for two hundred acres of land out of the same tract stated in the bill, but totally denies the position of that two hundred acres claimed in the bill, but gives its true position, as they allege by the copy of the bond which they have exhibited. The complainant below has not proved his own position to be correct by a single witness who ever saw or read the bond, or by any other kind of evidence, except the amended bill of McConnell, in the former suit against them, shall be adjudged good evidence, and sufficient to countervail the denial of the answers. This we cannot admit. It was anciently thought that a bill in chancery was good evidence against the party, even not under oath. But this rule was founded on a questionable basis. We well know that counsel are not restricted in crowding into their bills numerous allegations to dress their case, and leave it to the proof, if denied, to determine the correctness. Bills may also be written, framed, and filed by counsel, without appealing to the client for their correctness as frequently as a declaration at common law, unless the practice and rules of law require them to be sworn to by the client. A stronger reason in such cases could not be given for admitting such bills as valid testimony than there could be for admitting declarations at common law for the same purpose. Hence a modern rule is adopted, much more based in reason, to reject such bills as evidence to prove confessions against the party who filed them. The bill, in this instance offered as evidence, was not sworn to, nor was it required by the rules of practice so to be. For anything that appears, it may never have been seen and examined by Maxwell until it was set up against him in this suit. It attempted to detail the terms of a written contract which the counsel could not be presumed to have before him, or even to have seen. It is, therefore, deemed wholly insufficient to overrule and invalidate the answers in the present instance.

The defendants appear to have directed their attention, in this case, to proving that the bond, or the two hundred acres sold, covered the same ground that Rankin bought of McConnell; that he purchased of Maxwell in the first instance, and took possession from him; and afterwards, finding McConnell had an elder patent upon the land, he purchased it, to consolidate the claims and quiet his possession. On the contrary, Rankin, complainant below, seems to have made great efforts to prove that he first purchased of McConnell, and took possession from him of the farm on which he resides, and that the purchase set up in his bill from Maxwell was of entirely distinct and adjoining or contiguous lands. It is something singular that both parties should have avoided direct and special allegations to this effect in their pleadings, and try to make it out by depositions, and then in argument at the bar, *ore tenus*. This omission to notice so important a bone of contention in their pleadings, and then bestowing so much labor on it, pays no great compliment to the preparation of either party, and has aided to embarrass this cause to some extent, by leaving it in that darkness and doubt, which to a great extent rests upon it. The defendants, on their side, have produced two witnesses, unimpeached, conducting to fix the purchase from Maxwell to be anterior to that from McConnell, and to cover the original settlement and residence of Rankin; while Rankin has rebutted them by two more positive and, as far as this record shows, equally credible, showing that Rankin's purchase and possession from McConnell was the prior purchase. These two are also corroborated by the testimony of Mrs. McConnell, a third witness, the widow of him from whom the purchase was made. Add to this, that the bond exhibited and relied on by the defendants fixes the land to lie on the west side, or part, of Maxwell's survey; and, by doing so, it will be seen by an inspection of the plat that it cannot take in the residence of Rankin and his spring, unless it is extended eastwardly until it is much longer than wide. No aid can be derived from this testimony in fixing the position of the bond. Nor does the court attach any importance to the testimony adduced by Rankin, that Maxwell had said, if Rankin lost, it must be made up out of other lands. This was but the casual conversation of Maxwell, evincing what he intended to do in case Rankin lost, instead of proving that such a clause was in the bond, which Rankin himself in his pleadings does not attempt to swear was in it. The position of the two hundred acres, then, remains as fixed by the answers, and is not

changed by the proof in the cause. Taking the copy of the bond, then, for agreed, it fixes the two hundred acres in the extreme west of the survey. And although its expressions are not grammatical, yet its meaning is plain. The care taken to attach the bond to the west is evident, by the use of the superlative of the superlative—the most westernmost part of Maxwell's land.

To avoid the effect of these words, it has been contended in argument, that McConnell's elder grant covered this ground; that McConnell was possessed of his grant by actual settlement thereon, without the interference, which gave him the constructive possession of that interference; and that, of course, the "land" of Maxwell could not mean any part within the lines of McConnell, as he, having neither the legal title nor possession, had no land then, as his entry did not cover it, as surveyed by this court in the case of *Bosworth v. Maxwell*. Admitting the premises assumed correct, we could not adopt the conclusion. It would be giving the word "land" used in this bond a very technical meaning, and disregarding the intention of the parties in using it. The bond shows that the whole tract was in contemplation of the parties when they spoke of "land." It describes the tract as the one on which Maxwell resided, and as the pre-emption "got of Colonel Patterson." They therefore intended the whole, without the exception of the then untried effect of McConnell's interference, perhaps then unknown. And had they intended to have excluded McConnell's interference, they could have done so by words more appropriate. On the extreme west, disregarding McConnell's lines, the bond must be placed.

This is evidently along the line N O, on the connected plat, made out for the trial of this cause. This line, according to the calls of the patent, is within four degrees of a due north and south line, and, of course, presents itself as the extreme west. A line must be extended from the corner P, parallel to the line M N, until a line at right angles thereto, will include the quantity of two hundred acres. This places the land in as reasonable a form as the words of the bond will require. It is evident that this position is widely different from that assumed by the court below, so far as the indefinite terms of that decree enables this court to understand it. In directing the survey, as this court has done, another difficulty occurs. It is charged in one of Rankin's amended bills, that this land, or the greater part of it, is lost in the suit of *Bosworth and Maxwell*. This

loss is not denied by the answers. Besides, Maxwell contends, in this case, that the position given to his claim in that suit, in this court, is the correct one, and that he has a valid entry, able to cope with McConnell's legal estate, for so much land as is covered by his entry, when surveyed as there directed.

He has adduced in this cause testimony establishing the calls of his entry, and has given the position it assumed by the decree in that case. That testimony accords with that produced in the case cited. So far then as the validity of the entry of Maxwell is here in question, we adopt the same position given to it in that case. At all events, we cannot give it more of the land, assigned to Rankin in this decree, than the figure of the survey in that case has done. It is admitted by the parties that the patent of McConnell is the eldest; and it does not appear that Maxwell has possession without these decreed lines, for these he seems to show as the extent of the validity of his claim. It would not be equitable, then, to compel Rankin to take land which, by the opposite party's own showing, he has no title to, either in law or equity, and the possession of which he cannot give. He ought not, therefore, to be compelled, without his consent, to take any of the land outside of the decreed lines. And as it is evident that part of the land hereby allotted to him will be without the decreed lines and part within it, he ought not to be compelled to lose that which is within, as well as that for which he cannot get a valid claim. For it is a rule in the specific execution of contracts, that, if part of the land stipulated to be conveyed is lost, and part saved, it gives the party seeking that specific execution his election, either to take compensation for the whole, and to refuse to take any part of the land, or to take that part which is saved and have compensation for the residue. Such was the principle adopted by this court, in the case of *McConnell v. Dunlaps*, Hard. 41 [3 Am. Dec. 723]. Such election, this court conceives, Rankin ought to have in this cause.

The decree of the court below is therefore reversed, and the cause remanded to that court, with directions to cause the said two hundred acres to be laid down by actual survey, pursuant to this decree, carefully demarking and distinguishing between that part of the two hundred acres, which will be without the decreed lines of the survey of Maxwell's pre-emption, assignee of Patterson, when laid down pursuant to the opinion of this court, in the case of *Bosworth v. Maxwell*, and also what will be within said lines, the possession of which is held by Maxwell

or Rankin, or under Maxwell's claim, and then to permit Rankin to make his election whether he will take a conveyance for that part of the decreed lines, and have compensation for the residue, or whether he will reject the acceptance of any part of the land, and take compensation for the whole; and then to decree him compensation, either for the whole or part, according to his election; and also to make such further orders and decrees as equity may require for the termination of this suit.

As to the measure of compensation, it appears that the necessity of it is created by the interposition of McConnell's claim, and that no fraud is imputable to Maxwell, by reason of which the whole land cannot be obtained. According, then, to the repeated decisions of this court, the value of the land at the time of the contract, to be ascertained by the purchase-money agreed to be given, if practicable; if not, then by other evidence, ought to be the criterion, with legal interest thereon from the date of the contract, or the time the purchase-money became due, until paid. And as the price of the land is not proved in the cause, although there is proof of general value at that period, the court below is directed to ascertain the measure of compensation by an issue of *quantum damnificatus* tried by a jury. As to the cross-appeal of the defendants below, although Maxwell has filed an answer in the nature of a cross-bill, to which Rankin has responded, in which he claims the restoration of the possession of all the lands inside of his survey, which he accuses Rankin of taking under color of his purchase, we are of opinion that it is too brief and indefinite to offer a sufficient issue on that subject, and too vague to authorize the interposition of the chancellor in his favor, even if it was a case proper for equitable jurisdiction. We, therefore, refuse the interposition for his relief therein required, and leave him to the remedy that his legal title will afford him; and Rankin must recover the costs of both appeals in this court, as Maxwell's heirs have contended for the decree of the court below, and have only assigned as error that it did not go farther, and restore him the land.

Upon the subject of specific performance, with compensation for deficiencies, see Pomeroy on Contracts, sec. 434 *et seq.* See parallel cases: *McKean v. Reed*, ante, 318, and *Moore v. Skidmore*, ante, 233.

FORD v. SPROULE.

[3 A. K. MARSHALL, 228.]

A DELIVERY AND ACCEPTANCE OF GOODS, before the day of payment, passes the legal title to the vendee.

CONDITION PRECEDENT, SUBSEQUENT ACT IS NOT.—An act to be performed subsequently to another cannot be construed a condition precedent.

JURISDICTION TO ENFORCE LIENS is concurrent in law and equity.

A VENDOR HAS NO LIEN ON GOODS in case of the purchaser's insolvency, where before the insolvency the goods have been delivered to an agent for the purchaser, and the latter has sold them and assigned the contract to a third person for value, and directed the agent to deliver them, and the agent has accordingly charged the goods to the assignee.

A BONA FIDE ASSIGNEE OF A CONTRACT for the delivery of goods is not bound by any equities between the original parties arising after the delivery of the goods.

NOMINAL PARTY AS A WITNESS.—One who has been made a party, but who has no interest in the contest, is a competent witness.

EQUITABLE RELIEF WHERE CLAIM IS LEGAL.—If, by reason of acts of the adverse party, resort is had to equity to enforce a legal claim, no greater relief should be allowed than would be allowed at law.

WRIT of error to the circuit court. The opinion states the case.

B. Hardin and Wickliffe, for the plaintiff.

Crane, Littell and Hardin, contra.

By Court, OWSLEY, J. On the fourteenth of June, 1814, Ford & Warren contracted with James Coleman for Coleman & McGowan to deliver to him at Shippingport one hundred and eighty thousand pounds of hempen yarns, and on the same day gave four obligations, covenanting to deliver forty-five thousand pounds thereof on or before the tenth of August, forty-five thousand pounds on or before the first of October, forty-five thousand pounds on or before the tenth of November, and forty-five thousand pounds on or before the twenty-fifth of December next thereafter.

In July, after the date of the contract, Ford & Warren commenced delivering, and before the commencement of this suit had actually delivered at the warehouse of Berthoud & Son, in Shippingport, between one hundred and nineteen and one hundred and twenty thousand pounds of the yarns, and in pursuance to the written request of Ford & Warren, Berthoud & Son gave their receipt acknowledging the receipt thereof for and on account of Coleman & McGowan, and entered the same in their book to the account, and subject to the order of Coleman

& McGowan; and thereafter, by order of Coleman & McGowan, placed the yarns to the account and subject to the order of Sproule, Armstrong & Co., and by the order of Sproule, Armstrong & Co., placed the same to the account and subject to the order of Duncan & McCall.

For the purpose of regaining the possession of the yarns, and obtaining such relief as the circumstances of their case might authorize, Ford & Warren, in December, 1814, exhibited their bill in equity. They charge that Berthoud & Son had no proper authority to enter the yarns to the account or subject to the order of either Coleman & McGowan, Sproule, Armstrong & Co., or Duncan & McCall; that by the terms of the contract, Coleman was to pay for the yarn eighteen thousand four hundred and fifty dollars—one third thereof in six months, one third in eighteen months, and the residue in twenty-seven months; and that, although by the terms of their obligations, they bound themselves to deliver the yarns, as above stated, yet by the agreement of the parties, as a condition precedent to the delivery, Coleman was to pay six thousand one hundred and sixty dollars against the first of January, 1815, and secure the payment of the residue of the price by good and sufficient security; that having delivered about one hundred and nineteen or twenty thousand pounds, they informed Coleman of their readiness to deliver one hundred and fifty thousand pounds, and would deliver the balance upon being secured in the payment; that they were then informed by Coleman of his having transferred the yarns to Sproule, Armstrong & Co., and that he had in their hands about twenty thousand or thirty thousand dollars, out of which he intended to make payment; but upon again calling on Coleman, they were informed by him that Sproule, Armstrong & Co. refused to deliver up his funds, and acknowledged his inability to comply with his contract, and admitted that the yarns belonged to them (Ford & Warren), and then released them from any further compliance with their part of the contract; that Coleman also informed them he had made known to Sproule & Co. the nature, terms and conditions of the contract at the time of making the transfer of the yarns; that Coleman directed a letter to Berthoud & Son, suggesting he never had the possession of the yarns, and that they of right belonged to Ford & Warren; that they presented the letter and demanded of Berthoud & Son the yarns, but they refused to deliver them, alleging, that by the order of Coleman they were placed to the account and made subject to the order of Sproule, Armstrong &

Co., and by the order of Sproule, Armstrong & Co. they were placed to the account and made subject to the order of Duncan & McCall. They, moreover, charge that the yarns were worth fourteen thousand dollars; that they have never received any part of the price, and that Coleman & McGowan have become insolvent; they make Coleman & McGowan, Sproule, Armstrong & Co., and Duncan & McCall, defendants, and ask to be restored to the yarns, and general relief, and that an injunction may be granted, etc.

The judge to whom the bill was presented, made an order directing Berthoud & Son, either to deliver up the yarns, or give bond and security to have them forthcoming, ready to be delivered to the complainants, as the court might finally direct, or, on his failure to do so, for the sheriff to take the possession of the yarns, and deliver them to Ford & Warren, upon their giving bond and security, etc.

Berthoud & Son refused either to give bond and security or deliver up the yarns, and the sheriff took them in his possession, and delivered them to Ford & Warren. Ford & Warren were then about to dispose of the yarns, but, upon petition of Sproule, Armstrong & Co., they were by another order of the judge, restrained from doing so, and enjoined from proceeding further under the first order made, until further order of the court, etc.

Sproule, Armstrong & Co., then answered the bill, alleging they had no personal knowledge of the contract between Ford & Warren, and Coleman, but denying that the delivery of the yarns was to be dependant upon the conditions alleged in the bill; they charge, that understanding that Coleman held the obligation of Ford & Warren for the delivery of eighteen thousand pounds of yarns, and being informed that part thereof had been delivered in the warehouse of Berthoud & Son, they on the first of August, 1814, in good faith, made a contract with Coleman, whereby he, for a valuable consideration, gave his obligation to pay them nine thousand three hundred dollars, against the first day of July, 1816, and they advanced to him drafts to the amount of twenty-four thousand dollars, drawn in their favor by Duncan & McCall, on A. McCall, at Philadelphia, and payable four months after sight; and that, to secure them in payment of the nine thousand three hundred dollars, and for advances in the drafts aforesaid, Coleman assigned to them the obligations on Ford & Warren for the yarns, and agreed to deliver into their possession five hundred thousand pounds of

yarns, including the eighteen thousand pounds, for which Ford & Warren had given their obligation; that Coleman, accordingly, addressed an order to Berthoud & Son, in whose possession great part of the yarns were, directing them to deliver to Sproule, Armstrong & Co., all the yarns which then were, or that might thereafter be, delivered in their warehouse by Mr. John Hanna, or Ford & Warren; that upon presenting the order, together with the obligations of Ford & Warren assigned to them, to Berthoud & Son, the possession of the yarns was delivered to Sproule, Armstrong & Co., and entered in the books of Berthoud & Son to their account, and subject to their order. They further charge that, by their contract with Coleman, they were to have possession of the yarns, and not to dispose of them within less than twelve months, for less than fifteen cents per pound, but if the amount of the drafts advanced were not paid within that time, and the payment of the note of nine thousand three hundred dollars, secured by good indorsers, they were at liberty to sell the yarns for the purpose of discharging those sums, and in the meantime they were permitted to place the yarns in the hands of Duncan & McCall, or their agent in this country. They moreover charge, that on the same day they made a contract with Duncan & McCall, by which the yarns were to be placed in the hands of Duncan & McCall, to secure them the drafts which they had drawn in Philadelphia, and which had been delivered to Coleman, under his contract with Sproule, Armstrong & Co., and that, in pursuance of that contract, Berthoud & Son were directed, and have actually placed the yarns to the account, and subject to the order of Duncan & McCall.

They also allege that the drafts, which consisted in bills of exchange, drawn by Duncan & McCall, were protested for non-acceptance, but for the honor of the drawer were accepted by Balch & Ridgway; and that they (Sproule, Armstrong & Co.) in pursuance of their contract, have been under the necessity of remitting the amount thereof to Philadelphia for the purpose of discharging the bills, etc. They allege a strict compliance with the contract on their part; they are *bona fide* purchasers for a valuable consideration without notice; insist that the right of property in the yarns is legally in them, and rely, that a court of equity should not extend relief to Ford & Warren.

The answer of Duncan & McCall denies any knowledge of the contract, either between Ford & Warren and Coleman, or

between Coleman and Sproule, Armstrong & Co., and requires proof from the complainants of the several allegations of their bill. They allege that in the fair course of their business as commission merchants, perceiving the assignments to Sproule, Armstrong & Co., of the obligations given by Ford & Warren to Coleman, for the delivery of the yarns, and understanding that part of the yarns were delivered in the warehouse of Berthoud & Son, they received from Sproule, Armstrong & Co., an assignment of the obligations, and a transfer of the yarns as collateral security for the repayment of the sum advanced by them in the drafts on Philadelphia, referred to in the answer of Sproule, Armstrong & Co. They insist upon their right to indemnity out of the yarns, and refer to the answer of Sproule, Armstrong & Co., and adopt it as a part of their answer.

The answer of Berthoud & Son admits the delivery of the yarns in their warehouse, by Ford & Warren, but they allege that at the time of delivery they were directed by a letter from Ford & Warren to receive the yarns for and on account of Coleman, and in pursuance to that direction, the yarns were so received and entered in their books to the account of Coleman, and that sometime thereafter, being presented with the obligations given by Ford & Warren, assigned to Sproule, Armstrong & Co., together with an order from Coleman, directing a transfer of the yarns to them, the transfer was accordingly made, and the yarns placed to the account of Sproule, Armstrong & Co., and afterwards by the directions of Sproule & Co., they were placed to the account and subject to the order of Duncan & McCall; they deny the transfers were made without competent authority, and refer to the letter of Ford & Warren, and their exhibits as evidence of their authority, etc.

The answer of Coleman contains nothing material to the present contest, and need not be particularly recited. After these answers were filed, the court discharged the last order made by the judge, restraining Ford & Warren from disposing of the yarns, and made an order directing the yarns to be delivered to them, and to be at their disposal upon their giving bond and security to the account for the yarns to those who might be finally adjudged to be entitled to them. Bond and security were accordingly given by Ford & Warren, and the yarns taken into their possession by them.

Sproule, Armstrong & Co., and Duncan & McCall, then exhibited a cross-bill alleging the possession of the yarns to have been taken by Ford & Warren, and their having disposed of

them; they charge the yarns to have been of the value of two thousand dollars; allege they have sustained damage to the amount of three thousand dollars above the value of the yarns; insist upon their right to indemnity against Ford & Warren; pray admission of the original bill, and ask to be relieved under the cross-bill, etc.

To the cross-bill Ford & Warren responded, alleging that by the conduct of Berthoud & Son, in refusing to deliver them the yarns, and that of Sproule, Armstrong & Co., in obtaining the second order of the judge, the yarns by a flood of water became wet and greatly despoiled; that they never obtained possession of but part of the yarns; and after using the most vigilant efforts in taking the yarns to a foreign market, were enabled to sell them for little or nothing above the actual expense attendant on their arrival. They charge that Sproule, Armstrong & Co., and Duncan & McCall, received from Coleman three hundred and twenty thousand pounds of yarns, which by the contract with Coleman, was not to have been removed within twelve months, but which they did remove within that time; they insist, that in consequence of the removal, Sproule, Armstrong & Co., were bound to allow fifteen cents per pound, making a sum equal to the advances to Coleman, etc.

On a final hearing the court decreed a final dismissal of the original bill, and decreed Ford & Warren to pay five thousand eight hundred and eighty dollars and eighty cents, with interest from the twenty-second day of April, 1815, till paid, and cost. To reverse that decree, Ford & Warren have prosecuted this writ of error with supersedeas.

From the most attentive examination we have been able to bestow on the record, we entertain no doubt but the legal title to the yarns passed from Ford & Warren before the commencement of their suit in the circuit court. Under their obligations to deliver the yarns on or before the days therein mentioned, it is not supposed the title of the yarns would have vested in Coleman merely by a delivery before the day of payment, and in his absence, but by the letter of Ford & Warren addressed to Berthoud & Son requesting them to receive the yarns for Coleman, we apprehend Berthoud & Son were empowered to deliver the yarns to him, and having by his subsequent order, accompanied by the assignment of Ford & Warren's obligations, transferred the yarns to the account and subject to the order of Sproule, Armstrong & Co., the legal title to the yarns must be

admitted to have passed to and become vested in the company of Sproule & Co. By the order of Coleman addressed to Berthoud & Son, he manifested a willingness to receive the yarns which had been delivered in their warehouse by Ford & Warren, and by procuring a transfer of the yarns to their account and subsequent to their order, Sproule, Armstrong & Co. demonstrated an acceptance of the yarns; and although it might not have been regular to make a tender of the yarns before the day named in the obligations for payment, it is perfectly clear, that by an acceptance of payment before the day, the obligations would be discharged. Indeed, the circumstance of Ford & Warren having resorted for relief to a court of equity, seems to imply an admission on their part that the legal title to the yarns was not in them. For if they still retained the title, their remedy was complete at law, and there could have been no necessity for applying to the chancellor. It is true the bill alleges that by the contract the first payment was to be made by Coleman, and the residue of the price of the yarns secured by sufficient indorsers upon the notes given for the payment before the yarns were to be delivered. It is obvious, however, from the nature and terms of the contract that the delivery of the yarns was not to depend upon the payment of any part of the price, for most of the yarns were to be delivered prior to the day agreed on for the first payment of the price, and it would be absurd to suppose that a precedent condition which was to be subsequently performed. And whether or not, as the bill also suggests, it was agreed by the parties to the contract that Coleman should have the notes indorsed which were given for the payment of the price, cannot be important in the present contest. If such had been the undertaking of Coleman, his failure to comply might have formed an excuse for not delivering the yarns, but after the yarns were in fact delivered, and after part of the notes, as is proven in this case, were disposed of by Ford & Warren, the failure in not causing the notes to be indorsed, furnishes no cause for Ford & Warren to again assert title to the yarns.

But upon the supposition the legal title passed from Ford & Warren, it is contended that in equity they held a lien on the yarns for the price, and that, instead of dismissing their bill, relief ought to have been decreed there by the court below. Coleman is proven to be insolvent, and it is urged that the yarns have never come to the possession of Sproule, Armstrong & Co., or Duncan & McCall; and Ford & Warren's right of lien

is attempted to be maintained from analogy to the case of a consignment of goods upon credit, where, by the bankruptcy of the consignee before he obtains the possession, the consignor acquires a lien on the goods for the price.

Were it admitted that, by the insolvency of Coleman, Ford & Warren became invested with a right of lien for the price, it would not be denied but they proceeded correctly in applying to a court of equity for relief. Such a right was most clearly first recognized in equity, and, we apprehend, still forms properly a subject for the chancellor's cognizance. In latter times courts of law have also assumed jurisdiction in such cases, but the ancient jurisdiction of the chancellor is not to be taken away by the usurpation of courts of law. By a train of adjudications too numerous to be shaken, courts of law must now be admitted to exercise jurisdiction, but their jurisdiction is not exclusive of, but concurrent with, that of courts of equity; and having assumed the jurisdiction of the chancellor, in their determinations courts of law always adopt the principles, and are governed by the rules which control the decisions of courts of equity.

But we are not of opinion that upon any fair application of the doctrine of consignments, Ford & Warren's right of lien can be sustained. As between the consignor and consignee, it is well settled, that for a bankruptcy in the latter, the former gains a lien upon his goods, and may, during their transit to the consignee, either retake the possession of the goods, or resort to a court of law or equity to enforce payment of the price. But it is equally well settled, that after a sale of the goods by the consignee in possession of the bills of lading, the consignor, on account of the bankruptcy of the consignee, can neither retake the goods, nor gain a lien thereon for the price. The bills of lading are evidence of the consignee's right to sell the goods; and having purchased from the consignee holding the bills of lading, the purchaser is in no fault, and to subject the goods in his hands to the payment of the consignor's demand, would be allowing the consignor, by enabling the consignee to sell, to throw the loss on an innocent purchaser, contrary to the known principle, that whenever one of two innocent persons must suffer by the act of a third, he who has enabled the third person to occasion the loss, must sustain it.

If, then, the consignor can have no lien as against a purchaser from the consignee, it follows, that Ford & Warren can have none against Sproule, Armstrong & Co., and Duncan &

McCall. For, by giving their obligations to Coleman, and delivering the yarns in the warehouse of Berthoud & Son, accompanied with an authority in them to deliver the yarns to Coleman, Ford and Warren, most clearly, clothed Coleman with as ample power to sell, and furnished him with as high evidence of right, as the consignee, by holding the bills of lading can possibly possess. With a knowledge of the yarns in the warehouse, and perceiving the obligations of Ford & Warren in the hands of Coleman, Sproule, Armstrong & Co., made the purchase, and obtained an assignment of the obligations; and having thereafter accepted the yarns, and by the order of Coleman, caused them to be placed to their account, and made subject to their order, it would seem the yarns could not thereafter with any propriety, be said to be *in transitu*. It is true the yarns are not shown to have come to the corporal touch of Sproule, Armstrong & Co., but they are admitted by all to have been in the actual possession of Berthoud & Son, whose possession in legal contemplation, must be construed the possession of Sproule, Armstrong & Co., for after transferring the yarns to the account of Sproule, Armstrong & Co., Berthoud & Son held them as the bailees and agents of Sproule & Co., and that which is possessed by the agent, must be supposed in the possession of the principal. It is not, however, conceded that, even in the case of a consignment, the goods remain *in transitu*, until they come to the corporal touch of the consignee. It was once so held by Lord Mansfield, but that decision has been overruled, and the doctrine is now settled that there may be a sufficient delivery in law to determine the *transitus*: Law of Lien, 176.

If, therefore, the yarns were not *in transitu*, it is perfectly clear that upon no principle can Ford & Warren have acquired a lien upon them; for it is only when the goods are in that state that the bankruptcy of the consignee can authorize the consignor to retake them into his possession. But if, as against Coleman, a lien might have been acquired from analogy to the case of a purchaser of the consignee, Ford & Warren ought not to be allowed to assert it against Sproule, Armstrong & Co., or Duncan & McCall. Let it not be said, that as the assignees of Coleman, Sproule, Armstrong & Co., took the obligation, subject to all the equity which Ford & Warren might have had against him, and that upon that supposition a lien might have been acquired against Coleman, they ought, under the statute authorizing the assignment of obligations, to be permitted to assert

it against Sproule, Armstrong & Co., for the lien could not have been attached under any circumstances until Coleman became insolvent, and that is proven not to have happened until after the yarns were accepted by Sproule, Armstrong & Co., and until after they were transferred to them by Berthoud & Son, and surely the statute never can be construed to authorize the obligor to avail himself of an equity arising after payment to defeat the legal right of a *bona fide* assignee. But in argument it was contended that Sproule, Armstrong & Co. are not such assignees, but that they purchased and procured the assignment of the obligations with the fraudulent intent of preventing Ford & Warren from obtaining the price for the yarns.

To this argument it might be replied that the pleadings contain no allegation of fraud, and if they had, the evidence is altogether insufficient to prove it. The written contracts contain nothing from which fraud can be inferred, and the parol evidence is totally silent upon the subject. It is true, the agreement containing the terms of purchase by Sproule, Armstrong & Co., from Coleman, purports to have been in Frankfort, and the order given by Coleman, of the same date, directing Berthoud & Son to deliver the yarns, appears to have been given in Lexington; but that circumstance does not warrant the inference of a collusive combination between Sproule & Co. and Coleman. The distance between Frankfort and Lexington is not so great as to exclude the possibility of writings being executed by the same person on the same day at both places; but if it were, it would be more charitable to suppose an error in the date of the place, and more consonant to the principles of law, than to presume, from the difference of the date in the place, a fraudulent combination to defraud Ford & Warren.

Upon the whole, we are satisfied that Ford & Warren have shown no sufficient cause for applying to a court of equity for relief, and that their bill was properly dismissed. Notwithstanding, however, they may have resorted improperly to the chancellor, yet as by their act they have procured the order of the court depriving Sproule, Armstrong & Co. and Duncan & McCall, of the use of the yarns, they ought to be compelled to remunerate them for the damages occasioned thereby. Thus we are led to examine the propriety of the decree upon the cross-bill. From what has been said already, it will be perceived, that the right of property in the yarns was in Sproule, Armstrong & Co., and Duncan & McCall, so that it remains barely to decide upon the extent of relief to which they have

shown themselves entitled. And it may be here remarked, that the amount decreed is not more than the yarns are proven to have been worth at the time they were received by Ford & Warren. It is, therefore, unnecessary to inquire by whose fault the yarns were injured whilst in the house of Berthoud & Son, for as Ford & Warren have not been decreed to account for that injury, it cannot be important by whom it was occasioned in reviewing the decree against them.

But it is contended that Sproule & Co. received from Coleman other yarns sufficient to indemnify them for their advances, and it is urged that, having removed the yarns, contrary to their agreement, within less than twelve months, they should account therefor at the rate of fifteen cents per pound. It is conceded that, from the evidence, other yarns were received by Sproule & Co., but there is nothing in the cause to show that those yarns were sufficient to compensate them for their advances to Coleman.

They were, it is true, bound not to dispose of the yarns within less than twelve months, without allowing Coleman fifteen cents per pound, but they were permitted to place them in the hands of Duncan & McCall, and there is no evidence of the yarns having been otherwise disposed of within the time. Sproule & Co., therefore, cannot be compelled to account for more than the actual profits of the yarns, and there is nothing in the cause to show that to be sufficient to indemnify them. But, as by their answer, Sproule, Armstrong & Co., have admitted the bills advanced by them to Coleman, and which were drawn by Duncan & McCall, on Philadelphia, were protested for non-acceptance, and as they have failed to prove those bills have been since paid by them, it was contended in argument, they have failed to show any right to indemnity against those bills, and as such, it was insisted, their cross-bill ought to have been dismissed.

To this argument it may, however, be replied that, by drawing and disposing of the bills, Duncan & McCall, and Armstrong & Co., have imposed upon themselves an obligation to make good the amount; and the circumstance of their having been protested for non-acceptance cannot have discharged them from that obligation. Although the drawer of the bills may have refused to accept them, they may nevertheless have paid them, or, as Sproule, Armstrong & Co., allege, in their answer, the bills may have been accepted by another for the credit of the drawer, and in either event, Duncan & McCall would be

responsible for the payment of the bills. But under the pleadings in this cause it cannot be important to inquire into the evidence as to the liability of either Sproule, Armstrong & Co., or Duncan & McCall. For although Sproule & Armstrong admit the bills were not accepted by the drawer, they allege an acceptance by Balch & Ridgely for the honor of the drawers, Duncan & McCall; and there is no allegation either in the bill of Ford & Warren, or in their answer to the cross-bill of Sproule, etc., which can be construed into a denial of the liability of Sproule & Armstrong, or Duncan & McCall, to the payment of the bills; but to the contrary, the circumstance of their insisting, in their answer to the cross-bill, upon the amount of the yarns, which Sproule & Co. actually received, being equal to their claim against Coleman, rather implies an admission on their part of the justice of that claim; and more especially when in no part of their pleadings have Ford & Warren even suggested any objection against the validity of the claim.

We have thus far been considering this cause as if the depositions of Berthoud & Son were competent evidence, and this we have done, because we suppose the objections taken on the hearing to their depositions by Ford & Warren were properly overruled by this court. Berthoud & Son are, it is true, defendants in the bill of Ford & Warren, but it is well settled that the mere circumstance of their being defendants does not preclude their co-defendants from the benefit of their evidence.

And we are totally at a loss to perceive any interest which Berthoud & Son can have in the contest between Sproule & Co. and Ford and Warren. The yarns were deposited with them, and they asserted no claim to the yarns; and so far as they appear to have acted in the matter, it was either as agent for Ford & Warren or for Sproule, etc. Berthoud & Son, therefore, must be considered indifferent between the parties asserting right to the yarns, and as such are competent witnesses.

Upon the whole we are of opinion that Sproule, Armstrong & Co., and Duncan & McCall, have shown themselves entitled to the value of the yarns, and that the court decided correctly in pronouncing a decree in their favor therefor. But as their right to the yarns was purely legal, we are of opinion it was irregular for that court to decree running interest upon the value of the yarns, until payment should be made by Ford & Warren. If suit had been brought at law against Ford & Warren, it is perfectly clear that accumulating interest after judgment could not have been recovered, and as it was only on account of the possession of the yarns being acquired by Ford

& Warren, through the order of the court, that the chancellor could give relief, the extent of relief should have been measured by the amount which might have been recovered at law.

So much of the decree, therefore, as gives interest for a longer time than up to the time of rendering the decree by the court below, must be reversed, but the residue of the decree must be confirmed. Each party must pay their own costs in this court.

DELIVERY.—The law upon the subject of what is a sufficient delivery of goods to pass the title, is examined in *Ostrander v. Brown*, 8 Am. Dec. 211 and note.

VENDOR'S LIEN.—Upon the subject of the vendor's lien on goods sold, see *Palmer v. Hand*, 7 Am. Dec. 392.

CONOVER v. COMMONWEALTH.

[2 A. K. MARSHALL, 566.]

A SHERIFF NEGLIGENCELY LOSING PROPERTY upon which he has levied, is liable to the owner therefor; and no demand of restoration is necessary if the owner pays the plaintiff his debt. The loss of the property is enough, whether it occurs before or after payment.

ASSIGNING BREACHES OF BOND.—If the declaration on a bond sets out the condition and assigns the breaches, they need not be reassigned in the replication.

APPEAL from the circuit court. The opinion states the case. *Haggin and Hardin*, for the appellant.

Talbot, for the appellee.

By Court, BOYLE, C. J. This was an action of debt upon a sheriff's bond. The condition of the bond is set forth in the declaration, and the breach alleged is in substance, that in virtue of a *feri facias*, which issued at the suit of Saunders against the plaintiff, the sheriff by his deputy took two boats and a mare, the property of the plaintiff, and so negligently and carelessly left the same, that they were wholly lost to the plaintiff, and that during the retention and possession of the boats and mare by the sheriff, the plaintiff paid to Saunders the money due on the execution.

The defendants pleaded covenants performed, and the plaintiff replied severally, whereupon issue was joined, and a verdict and judgment having been rendered against the defendants, they have appealed to this court. It is objected by the assignment of error in the first place, that the declarations shows no cause of action in the plaintiff. When the sheriff seized the

goods of the plaintiff, under the execution, it was undoubtedly his duty to keep them safely, and this duty continued unquestionably as long as he had a right to retain their possession in virtue of the execution. It is true, when the plaintiff paid to Saunders the amount of the execution, he had a right to reclaim the goods, but the sheriff was not bound to restore them, unless he had sufficient evidence of the payment, and their restoration was demanded, and no such demand appears to have been made until the goods were lost. The duty of the sheriff, therefore, to keep the goods, must have continued till the time of their loss, notwithstanding the previous payment of the debt by the plaintiff, and consequently the loss of the goods by the negligence of the sheriff was a breach of his duty. The right of the plaintiff to maintain this action for such breach of duty, results from his having paid the debt to Saunders, and having thereby acquired a right to the restoration of the goods. The idea suggested by the counsel for the defendants, that the plaintiff should have made a demand of the goods from the sheriff, before he could have maintained the action, is founded on a mistake of the true cause of action. Had the action been brought for the refusal of the sheriff to restore the goods, such a demand would have been necessary. But it is the negligence of the sheriff in keeping the goods, and not his refusal to restore them, that constitutes the cause of action.

The averment, therefore, of the loss of the goods by the negligence of the sheriff was sufficient to show his liability, and the averment of the previous payment of the debt to Saunders was sufficient to show that the cause of action accrued to the plaintiff. The declaration is, therefore, sufficient.

But it is objected in the second place, that as the action is debt for the penalty of the bond, the replication is insufficient in not alleging the breaches of the condition. Where the action is brought upon the bond without setting forth the condition, and the defendant craves oyer of the condition, and pleads performance, it is necessary for the plaintiff in his replication to assign the breaches, but where the condition of the bond is set forth in the declaration, and the breaches assigned, as was done in this case, a general replication is sufficient. To repeat the assignment of breaches in the replication would be useless tautology, and is wholly unnecessary.

The judgment must be affirmed, with damages and costs.

See Freeman on Ex., sec. 270, as to the degree of care which an officer is required to exercise in preserving property levied upon.

CARNEAL v. MAY.

[2 A. K. MARSHALL, 887.]

A WRIT OF ERROR CANNOT EMBRACE TWO DISTINCT DECREES rendered at different terms although in the same suit.

ON RESCINDING A CONTRACT the law requires that the parties should be placed in *statu quo*, and it rests with the party objecting to the application of this rule to make out a clear case.

LOSS OF PART OF LAND—COMPENSATION.—A purchaser of land, who discovers, upon receiving the conveyance, that a part of it has been previously sold, may either keep the part conveyed and claim compensation for the residue, or reject the conveyance and seek compensation for the whole.

PARTIES TO A DEED CANNOT IMPEACH THE CONSIDERATION expressed, but they may show that it was paid in property and not in money.

IF DISTINCT CONTRACTS FOR UNDIVIDED MOITIES of a tract of land be made, though one of them should be vacated, the other, if fair, should be permitted to stand.

ERROR to the circuit court. The opinion states the case.

Hardin, for the appellant.

Haggin, for the appellee.

By Court, **MILLS, J.** On the twenty-seventh day of June, 1795, William May sold to Thomas Carneal twenty-four different tracts of land, supposed to contain twenty-three thousand two hundred and fifty-six acres, for the sum of twenty-one hundred and fifty pounds. Carneal gave his obligation for the purchase-money, and also, afterwards, on the fifteenth day of May, 1799, executed to said May a mortgage to secure the purchase-money on several negroes and divers tracts of land, a few of which are some of the first tracts sold by May to Carneal. May, at the date of the sale, executed to Carneal a conveyance for all the lands so sold him, warranting the lands against himself and heirs only, and not against other claims. Also at the same period of the original contract, the parties entered into articles of agreement, which refer to the deed of the same date, and declare that Carneal took the claims at his own risk as to validity of title, and expresses that some of the tracts of land so sold were entries only, and not carried into grant, and that Carneal took upon himself the expenses of completing the titles and paying further taxes; and that May, on his part, was only to furnish said Carneal with copies of each and every entry on which the claims were founded, and copies of the plats and certificate of surveys of all such tracts as had been surveyed,

and the patents of all those for which patents had issued, together with the writings obligatory by which he, May, claimed an equity in any of the tracts in which he held an equity only; and having done that, it was to be considered that May had complied with his part of the contract. After making sundry other provisions relative to the purchase-money the following clause is inserted, to wit: "And lastly, it is agreed on by the said Thomas, that the said May has a lien on the whole of the property sold by him, and the same is acknowledged by the said Thomas, that is to say, the twenty-three thousand two hundred and fifty-six acres in twenty-four tracts, as will appear by having reference to the deed given by the said May and wife unto the said Thomas, of even date to this article, the whole being held as security for the payment of the purchase of twenty-one hundred and fifty pounds."

On the twentieth of February, 1797, May furnished to Carneal the entries, surveys, and patents stipulated to be given or furnished by the afore-recited contract, and Carneal executed his receipt of all that May was bound to furnish. Part of the purchase-money stipulated to be paid was to be paid in hand, and Carneal went on at different times to make partial payments, of which the parties had settlements, the details of which need not be here recited. Among the numerous tracts so sold and conveyed was a tract or entry of six thousand acres on Bough creek, which has given rise to this controversy. This entry was made in the name of Benjamin Stevens, and is stated and represented in the deed and other writings first entered into, to bear date the fifteenth of March, 1784, and the original entry is, in fact, of that date, and was the one produced to Carneal in fulfillment of the contract by May on the twentieth of February, 1797, for which, among others, Carneal gave the afore-said receipt acknowledging the discharge of the contract. To one moiety of this entry May was entitled equitably for location or otherwise, and this moiety was included in the conveyance or contract with Carneal. Stevens, the original claimant of the entry, assigned the remaining moiety, or his right in the entry, to Ralph Phillips, who for the future of this history stands in the place of Stevens.

On the twentieth of February, 1797, Carneal and Phillips had a survey made on the part of said entry in the name of Stevens, and obtained a patent therefor, being the quantity of two thousand eight hundred acres, bearing date March 8, 1806, leaving three thousand two hundred acres of said entry not

surveyed. This survey and patent appears to be on the same warrant with the entry of the fifteenth of March, 1784, in the name of Stevens, and on the same entry. On the twenty-fifth of January, 1809, Carneal gave May a written notice, in the form of a letter, informing him that he had, a short time past, discovered that the entry of the fifteenth of March, 1784, had been amended so as to change its ground, on the seventh of February, 1786; that thereby the entry was lost; that older grants covered the ground of the amendment; and claiming of May the value of the tract so lost; and also intimating that the said May being the locator, and having amended the entry, was liable to Philips, the holder of Stevens's half, on account of the land being endangered or lost, as well as to himself, because the original entry was the one sold, as well as the one produced on account of the contract, because a receipt was given. On the same day when this notice was given, the parties, May and Carneal, settled their accounts and partial payments in discharge of Carneal's bond, and fixed the balance due to be one thousand three hundred and thirty-five pounds ten shillings and two pence, bearing interest at six per cent. per annum from the seventh of June, 1808, which account and settlement is filed, and on the back of it, at the same date, the parties indorsed and signed a writing to this effect:

"Thomas Carneal and William May doth agree as followeth, to wit: That whereas the said May did sell Thomas Carneal one equal moiety of an entry of land for six thousand acres, entered with the surveyor of Nelson county, in the name of Benjamin Stevens, on the fifteenth of March, 1784; and whereas an amendment was made to the said entry on the seventh of February, 1786, in substance amounts to a withdrawal and total loss of the land; and whereas in the sale of said entry no notice was taken of the said amendment by the said May, having slipped his memory. And the said May being desirous that the said Carneal shall not be a loser in consequence of this oversight, the said May does by these presents agree to allow him a credit of five hundred and thirty-four pounds, first cost and interest up to the twenty-seventh of June last past, and the same is credited in the within account and settlement, and the said Carneal is to have no further nor hereafter claim against the said May, in case of the loss of said entry."

That the entry was amended so as to change the ground, is not only shown in this cause by the foregoing writing, but by a copy of the amendment filed, together with the original entry.

Perhaps at the same time (for at what time does not distinctly appear), it seems that there was an understanding took place between May and Carneal, that Carneal should procure Phillips's interest for May, in the entry aforesaid; and it was by letter from Carneal to May, previously hinted to May, that Phillips, who was the owner of Stevens's interest, contemplated holding May responsible, as locator, for the loss of the entry by the amendment. Carneal accordingly received from Phillips an assignment of his whole interest in the entry dated the twenty-second of June, 1809, for which he gave his note for seven hundred and fifty dollars. A copy of this assignment was transmitted to May by Carneal, in a letter dated on the first of February, 1810, in which he is told that the assignment is for his benefit, or that "he is to have the benefit of it, upon the upon the same terms he had the other moiety;" and that if he adjudged it insufficient, a better one should be procured, or that whatever was necessary should be done. Accordingly, on the twenty-second of June, 1810, another credit is given on the bond from Carneal to May for another five hundred and thirty-four pounds, to operate as a payment on the twenty-seventh of June, 1808; and on the same day, in the handwriting of Carneal, an assignment was written and signed by him on the same paper containing the assignment from Phillips to Carneal, assigning to May all the whole entry. But this assignment is now found filed in the register's office, canceled and obliterated, but yet so plain that it can be read, accompanying a plat and certificate of survey for the three thousand two hundred acres, the balance of the six thousand acres after two thousand eight hundred acres, the first patent, is deducted, and the patent for said two thousand three hundred acres issued to Thomas Carneal entirely, dated nineteenth of September, 1810; and no title was made to May during the life of Carneal, except that on the tenth of September, 1810, the said Carneal, by deed executed for himself, and as agent for Ralph Phillips, conveyed the whole of said two thousand eight hundred acre patent, issued to Carneal and Phillips jointly; in which conveyance Carneal binds himself to be responsible for all damages in case the said Phillips or his heirs shall ever claim or recover the land.

After the death of Carneal, which took place shortly after the last named conveyance to May, he, May, filed his bill against Carneal's heirs and administrators, to foreclose the mortgage for the balance of the price due for the lands in the Fayette circuit court, suggesting in his bill that the last named credit

was given for Phillip's moiety of the six-thousand-acre tract of land was a mistake, and ought not to have been entered on the bond. An answer was put into this bill without oath, signed by James Coleman for himself, and the other defendants; he, the said James Coleman, being the administrator of the estate, and styling himself special guardian for Abicia D. Carneal, another heir, now the wife of James D. Breckenridge.

In this answer the mistake is admitted, and the cause proceeded to immediate trial on the filing of the answer, and thereupon that court directed the whole balance due on the bond to be paid, exclusive of the last named credit; and that if the money with interest was not paid on the first of October, then the next following, the decree being rendered in August, 1811, then the equity of redemption in the slaves and other estate should be barred and foreclosed, and commissioners were, in the same decree, appointed to sell the mortgaged estate, and out of it to satisfy the debt, interest, and cost of suit. The decree then expresses that the commissioners were to "report and certify to the court their proceedings therein, that such other and further decree might be made as the court should deem proper. And that the question of costs and the final decree was reserved until the coming in of the report."

This decree and suit appears still to remain in the Fayette circuit court, still in the same situation, without further order or decree. But on the ninth of May, 1812, by a writing on a copy of said decree, May assigned over all his right, title, and interest to said decree, to said J. Coleman, and authorized him to act in the premises, and proceed in said decree as he himself could do, and expressing on the face of said assignment that it was for, and in consideration of, the full amount specified in the decree, paid to him by said James Coleman, in his individual capacity, and not as administrator.

After this, and before the commencement of this suit, the said James Coleman appears, by order of the county court, who granted the administration, to be ousted from the administration of the estate, and letters of administration *de bonis non* were granted to Thomas Davis Carneal, another heir.

But it appears that said Thomas Carneal, in his life-time, on the twenty-second March, 1806, in a letter to Jones Love (which letter appears to be addressed in answer to one first written by Love), writes to this effect: "I proceed to reply to you, and I observe what you say with respect to surveys which you have by you, and some warrants located to fill them with.

I have part of a warrant of six thousand acres you mention, and only about two thousand eight hundred acres acted on. The balance stands entered. If you think proper you may act on the balance, and this shall authorize you to do so. The surveys must be made out in the name of Ralph Phillips and Thomas Carneal, assignee of Benjamin Stevens. I will give you one equal half of the lands recovered, whatever it may be. This, I believe, common. Indeed, custom has almost become a law in this case. I have a quantity of other warrants standing on the same ground with this; which you can have on the same terms, if you think proper." This writing or letter, dated on the tenth of January, 1809, was assigned by said Love to Kimball Carlton and John Nugent, and by them, on the tenth September, 1811, assigned without recourse, to Thomas Reynolds and Samuel McGuffin, who resided on the land. A patent issued on the nineteenth September, 1812, for the said three thousand two hundred acres, to Thomas Carneal, as above stated; but the date of the survey, as recited in the patent, bears date twentieth February, 1797, and purports to have been made on the amended entry of Stevens's warrant, bearing date seventh February, 1786. In answer to a bill filed by Kimball Carlton and J. Nugent, while they held the letter from Thomas Carneal to Love, against the said Carneal, the said Carneal admits that he has always been ready to convey the undivided moiety of a tract of land mentioned in the letter dated twenty-second March, 1805, and on which there appeared an indorsement to said Carlton and Nugent, and declares he is willing to make the conveyance at any time when called upon. He adds that he had no recollection of ever having seen the letter from the time he wrote it until the date of that answer, which appears to be sworn to and filed on the twenty-ninth June, 1810.

At the same date on which May assigned over his decree in the Fayette circuit court, on the mortgage to James Coleman, he represented to him, that he was certainly entitled to the whole of said three thousand two hundred-acre patent by virtue of his rescission with Carneal, and purchase of Phillips, through Carneal above detailed, and that the assignment before alluded to, in the register's office, ought never to have been erased, and that the patent ought to have been issued to him. In consequence of these statements, Coleman having purchased and received a conveyance of the interest of Thomas Davis Carneal, in his father's estate, and claiming his wife's share, executed a

conveyance of the whole tract by himself, and as attorney in fact for Breckenridge and wife; but not executed by his own wife. On this conveyance said May brought his ejectment in the Breckenridge circuit court, and obtained a judgment therein against the said Reynolds and McGuffin, claiming under the letter of Carneal to Love. To avoid this judgment, said Reynolds and McGuffin filed this bill against Carlton, Nugent, and Love, their assignors, and against said May and the heirs of Carneal, with an injunction charging May with notice of their claim before his deed from Coleman, relying on the aforesaid letter, and Carneal's answer to the bill of Carlton and Nugent, and praying a conveyance of the tract of land of three thousand acres, or a moiety thereof, and if they failed in this, compensation against Carneal's heirs. To this bill May answered, resisting their claim, and denying notice before his conveyance from Coleman, except by report; admits his conveyance is incomplete; but contends that, if he must lose the land, Carneal's estate ought to be made responsible to him. He accordingly extends his answer in the nature of a cross-bill, setting out the whole of the foregoing matter between Carneal and himself, as above detailed, prays an answer thereto, and that if Reynolds and McGuffin get any part of the land, he may recover against Carneal's estate the amount of his two credits, on Carneal's bond of five hundred and thirty-four pounds each, with interest. Carneal's heirs respond to the bill of Reynolds and McGuffin, rather favorably, and also extend their answer in the nature of a cross-bill against May, alleging he has recovered too much money on his mortgage in the Fayette circuit court, and pray for a decree for it back again.

They contest many of his allegations, and thus while Reynolds and McGuffin are endeavoring to coerce their equity for the land, May and Carneal's heirs interplead in the same suit, and travel over all the transactions between May and Carneal, relative to said six thousand acres of land. The circuit court took up the cause at one term as between the complainants, Reynolds and McGuffin and defendants, and decreed to said complainants, Reynolds and McGuffin, the one moiety of the tract of three thousand two hundred acres. At the same term, the court admitted May's answer to the answer of Carneal's heirs, which had never previously been filed, and continued the cause as between Carneal's heirs and May, and at a term long subsequent heard the cause between May and Carneal's heirs, and gave a decree in favor of May, that he recover against them the

said two credits of five hundred and thirty-four pounds each, with interest, and the whole contracts by which May repurchased the moiety of Philips, as well as that of Carneal, in the six-thousand-acre tract, should be rescinded.

By the assignment of error, and also by the names of Reynolds and McGuffin being inserted in the writ of error, it seems that Carneal's heirs, who have brought the cause before this court as plaintiffs, have intended to try the merits of both decrees, to wit, that between Reynolds and McGuffin and the defendants, as well as that between May and Carneal's heirs. But these decrees are distinct and different from each other, rendered at different times, and each of them final, so that they cannot be comprehended in a joint writ of error. Besides, we view the present writ of error as a writ to the decree between May and Carneal's heirs only. For although it includes the names of Reynolds and McGuffin, yet that is by way of description only, and in other parts it describes the decree between May and Carneal's heirs, and that decree is now only before this court. The decree between Reynolds and McGuffin and Carneal's heirs, has given to the complainants one moiety of the tract of three thousand two hundred acres, and we are relieved from deciding the question as to their right to it against the heirs of Carneal, or against the equity of May to the same land, and shall only inquire into the redress, if any, which May is entitled to against Carneal's estate. It is contended in the pleadings by Carneal's heirs, that although May gave to Carneal a credit of five hundred and thirty-four pounds, with its interest, on account of the removal of the entry, for Carneal's moiety, yet Carneal was to keep the entry or land itself, and the credit was only to be considered as an abatement of so much of the purchase-money in the whole contract, for the supposed injury caused by the amendment of the entry. And, indeed, the expressions in the agreement of 1809, seem to favor this idea. The expressions on which the reliance is placed are in these words: "And the said Carneal is to have no further nor hereafter claim against the said May, in case of the loss of said entry." But these may receive a construction consistent with the obligations on Carneal to restore the entry or land. In the body of the writing, the parties express what they mean by the loss, and say that the amendment amounts to a withdrawal and total loss of the land. This, then, was the loss for which May was not to be further responsible, and the words "in case" may be construed to intend the same as "on account of."

Taking the expressions, then, as applying, not to a future, but former loss, expressed in the writing, the words amount to an acquittance on the part of Carneal to May; that he will set up no further claim on account of the withdrawal or amendment of the entry. The contract between May and Carneal, as to the moiety of the six-thousand-acre tract of land, was completely rescinded; and on that rescission, it would become the duty of Carneal to restore the land. Such would be the consequence without any stipulation to that effect; and it would lie in the representatives of Carneal, to prove that there was an understanding that Carneal should not reassign the claim; and this they have not done. But this matter is not left to inference. Carneal, in a subsequent letter to May, which has been recited, declares to May that "he is to have the benefit" of Philip's moiety; "upon the same terms he had the other," to wit, his, Carneal's, moiety. This shows that May was to have the entry back, such as it was; and it is reasonable to conclude, that if May had then known that Carneal had gotten the land surveyed, and that he had actually sold the half to Love, under whom Reynolds and McGuffin claim, he never would have taken back that which he could not get, because Carneal had parted with it. And further, it seems that Carneal intended this when he made the assignment to May of the plat and certificate, which has been obliterated, and from whatever cause it may have been erased, if it had stood, it would have given May no more than he was actually entitled to. It follows, then, that May could have made no fraudulent representation to Coleman, as has been alleged on the part of Carneal's heirs, to induce Coleman to make him the conveyance which was last made; and that by said conveyance, had it passed a complete legal estate, he would have been entitled to have kept it. But as that estate, so conveyed by Coleman, whether complete or incomplete, has been partially defeated by the claim of Reynolds and McGuffin, which originated from Carneal himself, it follows that May has his election not to take any part of Carneal's moiety of the whole six thousand, and is entitled to a decree for its value and its interest, as the court below has decreed, unless he has since done some act which deprives him of it. For this purpose his decree in the Fayette circuit court, including five hundred and thirty-four pounds too much, which is the exact value of Carneal's moiety of the six thousand acres, and his assignment or conveyance of that decree to Coleman, in which he acknowledges the consideration of the amount of the whole decree, as

the consideration for which he transferred or conveyed, is relied upon. And it is contended in the answers, as the transaction was fair, the expression of the whole amount, by way of consideration, estops May from saying that he did not receive the whole amount in money. Hence it would follow, that if that writing is conclusive against May, as he then received five hundred and thirty-four pounds too much, he ought not to receive an equal sum now.

It is a well settled general rule, that the parties to a deed cannot contradict and impeach the consideration stated on its face, unless on account of fraud in the writing or execution of the deed, or some mistake has crept into the transaction. But it does not thence follow that the parties may not show that the consideration, expressed as a sum certain, was not received in money, but in other articles valued at the time by the parties to that amount of money of which the consideration was composed. Hence we conceive that May, in the present case, ought to be permitted to show that part of the sum expressed by him to be received in his deed of transfer to Coleman, was in money, and the remaining part in the tract of three thousand acres of land in question, half of which is now decreed to Reynolds and McGuffin. It seems very evident from the proof, that he was to have had from Thomas Carneal, in his life-time, this tract of land at five hundred and thirty-four pounds, with its interest, and that he actually gave Carneal a credit for that sum upon his bond, but that he never did receive from Carneal, in his life-time, a conveyance or assignment of the title. It also appears, that on the same day that he made a transfer to Coleman of the decree and mortgaged estate therein mentioned, a deed of conveyance was prepared from Coleman to him for the three thousand two hundred acres of land, and either then, or shortly after, executed by Coleman, being the very land now decreed to McGuffin; Coleman also acknowledges, in a written statement, that he paid no more money in consideration of the conveyance or transfer of the mortgaged estate, than what May in his bill and answer alleges, being the exact balance after the five hundred and thirty-four pounds, with its interest, is deducted. Besides, in the settlement of the estate of Carneal with the new administrator, Coleman charges and is allowed precisely the same sum of money, which equals the amount of the decree and deed of transfer, when that amount is added to the five hundred and thirty-four pounds, with its interest. This renders it evident that Coleman paid a part of the consideration

which May, in the deed of transfer of the decree and mortgage, acknowledges to have received, by the very tract of land, a moiety of which is decreed to Reynolds and McGuffin. Add to this that the answer of Coleman is evasive on this subject. He does not venture to swear positively that he paid the whole money. He admits a discount, but he alleges he cannot remember what that discount was, when his settlement with Carneal's administrator *de bonis non* would have furnished him with the written evidence of the amount if his memory was treacherous. These circumstances show that the whole consideration was not money, but that five hundred and thirty-four pounds thereof was discharged by the very tract of land, a moiety of which is lost in this suit in consequence of a prior contract with Carneal, the decedent. We, therefore, concur with the court below as to so much of the decree as rescinds the contract relative to Carneal's moiety of the land.

But we do not approve the decision of that court, which rescinds the contract with Carneal for Philips's moiety. It is true, that the first purchase from Carneal, as well as that of Philip's half, was of a moiety undivided. But still each contract was distinct and separate. His having procured Carneal's moiety by a rescission of his old contract with Carneal, *pro tanto*, might have induced him to procure the other half. But, whatever might have been his inducements, they were not presented to him by Carneal, nor can he or his heirs be affected by them. That contract seems every way fair. Although he had engaged Carneal to make the contract for him about or at the same time when he purchased the first moiety, and if Carneal was successful in making the purchase from Philips, he was to have it, yet it is evident if Carneal was unsuccessful he was still to keep Carneal's half, and Carneal was not bound to take it back. It is true that both purchases have been somewhat blended by one conveyance, but this does not affect the merits of either purchase. It is urged in the pleadings that the conveyance from Carneal, for the tract of two thousand eight hundred acres, is defective inasmuch as it is executed by Carneal for himself, and as attorney in fact for Ralph Philips, and there is no regular letter of attorney authorizing Carneal so to act for Philips. This statement appears to be true, but it is equally clear from the evidence and deed itself, that May was apprised of these defects when he took the deed. For there is a stipulation in the deed, as well as on the back of the patent, providing against these defects, and making Carneal responsible, if Philips or

his heirs should ever claim the land. From this defect May appears to have sustained no injury.

Sometime after the commencement of this suit Philips executed to him a complete release of all his title to the tract of two thousand eight hundred acres; but he has resisted the acceptance of it without good cause. The half, then, which he purchased last from Carneal, as procured for him from Philips, can still be assigned him by leaving him to hold the tract of two thousand eight hundred acres; for which he has a complete title; and if that does not amount to half, according to quantity and quality, when a proper assignment is made, then the residue of his moiety can be assigned him out of that part of the tract of three thousand two hundred acres, which is not decreed to Reynolds and McGuffin. Or, if it shall be deemed more equitable to divide both parts, the moiety of the three thousand two hundred acres not assigned to Reynolds and McGuffin can be assigned to him, and Carneal's heirs be decreed to convey it; and the tract of two thousand eight hundred acres in like manner be divided agreeably to quantity and quality, and May can be decreed to convey to Carneal's heirs the moiety thereof. There is no difficulty, then, in giving him his purchase of Philips's half, and this court conceives it was erroneous to decree to him the last five hundred and thirty-four pounds with its interest, as the value thereof. But the first sum of five hundred and thirty-four pounds, with its interest, was correct for Carneal's moiety. It is also assigned for error that that court ought not to have left the title of the three thousand two hundred acres conveyed to May by Coleman in May's hands. This error seems to be well founded. For, as that court decreed a rescission of all contracts, it ought to have directed May to convey back what title he had gotten under them. And, inasmuch as this court approves of so much of the decree of that court as rescinded his first purchase, he ought to be compelled to restore to Coleman, and the other heirs of Carneal, such title as he derived from Coleman's conveyance, and after a division is made according to this opinion, the parties, by proper conveyances, ought to be directed to complete the partition so as to vest in each the complete legal estate. The decree of the court below must, therefore, be reversed with costs in favor of the heirs of Carneal against May, and the cause remanded for new proceedings to be had in accordance with this opinion.

ON RESCISSION OF A CONTRACT for fraud, a party has no right to retain any part of the consideration he has received: *Kimball v. Cunningham*, 3 Am. Dec. 230. As to the rights of a vendee on rescission of a contract for the sale of land, see *Perkins v. Rice*, and note, *ante*, 298.

SPECIFIC PERFORMANCE WITH COMPENSATION.—Upon this point see a similar decision: *Rankin v. Maxwell*, *ante*, 431; *McKean v. Reed*, *ante*, 318; *Moore v. Skidmore*, *ante*, 333; and Pomeroy on Contracts, sec. 434, *et seq.*

CONTRADICTING RECITALS AS TO CONSIDERATION.—See on this subject *Chiles v. Coleman*, *ante*, 396, and cases cited in the note thereto.

C A S E S
IN THE
SUPREME COURT
OF
LOUISIANA.

FOSTER v. DUPRE.

[5 MARTIN, 6.]

INTEREST ON UNLIQUIDATED CLAIM.—Interest will not be allowed on an unliquidated claim.

ASSUMPSIT IN CASES OF TORT.—An action for money had and received, or laid out and expended, will not lie, as upon an implied promise, to recover expenses occasioned by a tortious act of the defendant.

PETITION for the recovery of one thousand five hundred and ninety-nine dollars and seventy-five cents, and interest thereon for eight years, for the expenses of a certain suit originating in a tortious act committed by the defendant. The petition contained two counts: one for money laid out and expended for the use of the defendant, and another for money had and received. Plea, the general issue. There was a judgment for the plaintiffs in the court below for the full amount claimed, from which the defendant appealed. The facts are stated in the opinion.

Clark, for the plaintiffs, contended that assumpsit, as upon an implied promise, would lie for money paid out by reason of a wrongful act of the defendant, and cited: *Bess v. Dickson*, 1 T. R. 281; *Hassar v. Wallis*, 1 Salk. 28; 2 Burr. 1012; 1 T. R. 732; *Shelton v. Rastal*, 2 Id. 365; *Robertson v. Eaton*, 1 Id. 59; *Jacob v. Allen*, 1 Salk. 26; *Allen v. Dundas*, 3 T. R. 125; *Arthy v. Reynolds*, 1 Burr. 1012; *Smith v. Brownley*, 2 Str. 915; *Crockehst v. Bennet*, Doug. 671; 2 T. R. 763; *Whip v. Thomas*, Bul. N. P. 130; *Clark v. Shee*, Cowp. 197; *Trelhave v. Terry*, Bul. N. P. 131; *Moses v. McFarlane*, 2 Burr. 1005; *Jaques v. Goulingsly*, 2 Bl. 1073; Id. 219; *Jaques v. Wethy*, H. Bl. 65;

Browning v. Thomas, Cowp. 79, as showing the extreme liberality indulged by the courts in the use of this form of action in analogous cases.

Porter, for the defendant.

By Court, MARTIN, J. The judgment of the district court is certainly erroneous in the allowance of the sum of eight hundred and ninety-six dollars, for interest during eight years preceding the inception of the suit. There is not any stipulation for conventional interest; the sum claimed is an unliquidated one. We are at a loss to see on what ground any interest was allowed for any period antecedent to the suit; no other demand of the money claimed appearing to have been made. For this reason, the judgment must be, and is, annulled, avoided, and reversed.

Proceeding to inquire what judgment the district court ought to have given, we find the action brought on an illegal contract, and we seek in vain for any agreement to which the defendant gave any express or implied assent.

The facts are, that the defendant came out a passenger in the plaintiffs' ship from New York; that in the Narrows a boat approached the ship, and put aboard two slaves, the defendant's property, who were concealed under the hatches, so long as the ship was within the reach of officers of the customs, both in New York, and in the Mississippi; that the ship was seized on account of these slaves, and that the plaintiffs incurred the expenses stated in their account in order to procure her to be restored.

The case is that of a tort or injury, from which may result an obligation to pay damages; but the plaintiffs have chosen to turn it into a promise to pay certain costs, which they have incurred, and which they allege were paid at the request of the defendant. If he promised to pay these costs, an action certainly lies on his promise. If they were paid for him, and at his request, an action equally lies on the promise, which the law raises. In neither case will he with success contend that he committed no tortious act.

The plaintiffs' counsel has cited a number of authorities from English books, tending to show the extension given to the action for money had and received. But they are all cases of money received by the defendant. Neither in Great Britain, the United States, nor in any country, in which the distinction between actions grounded on contracts is known, was it ever

successfully alleged, that the commission of a tortious act is evidence of a promise to repair the injury done, by yielding damages. The plaintiffs, by the nature of their action, have alleged a promise as the basis of their claim. The defendant has put this promise in issue; there is not any evidence of an express promise, and the law does not warrant us in declaring that there is an implied one. It is true, a tort is set forth in evidence, but as the nature of the pleadings did not authorize the defendant to defend himself against this charge; as the promise, if really made, admitted it, or waived the right of offering anything in opposition to the charge, we cannot consider the question how far the plaintiffs have a right to indemnification?

It is, therefore, ordered, adjudged, and decreed, that judgment be entered for the defendant, with costs of suit in both courts, without any prejudice to the plaintiffs' claim for damages, if any they have.

Upon the question of interest depending on demand, see note to *Selleck v. French*, 6 Am. Dec. 188.

RAMSEY v. STEVENSON.

[5 MARTIN, 23.]

CONFLICT OF LAWS IN TRANSFER OF PERSONALTY.—An assignment of movables situate in this state, must be made in accordance with the law of this state, in preference to that of the owner's domicile.

CHANGE OF POSSESSION.—An assignment of movables for the benefit of creditors, must, to be valid against third persons, be consummated by a delivery of possession.

APPEAL. Stevenson, then residing in Maryland, in October, 1816, made to McCulloch and Holmes, an assignment of all his estate for the benefit of all his creditors. The assignor and assignees all resided in Maryland, and the assignment was in due form, according to the laws of that state. Subsequently, Ramsey, a creditor of Stevenson, sent to Louisiana, and there attached a large quantity of goods, which were claimed by the assignees. The lower court having decided against their claim, they appealed.

Stannard, for the assignees: The assignment vested the assignees with title to the property; being valid in Maryland, of which all the parties were citizens, it must be equally valid

in Louisiana: 2 H. Black. 409; *Sill v. Warsaw*, H. Black. 690; *Cleve v. Mills*, Cooke's Bank. Laws, 370; *Case of Captain Wilson*, Id. 373. That personal property is subject to the law which governs the person of its owner: *Ex parte Stewart*, 2 Am. L. J. 184; *McIntosh v. Ogilvie*, 4 T. R. 193; *Folliot v. Ogden*, 1 H. Black. 139; *Robinson v. Bland*, 1 Black. 262; *Le Chevalier v. Lynch*, 1 Doug. 170; *Simonton's case*, 2 Martin, 102.

Duncan, for the attaching creditor, cited *Dumford v. Brooks*, 3 Martin, 222; *Taylor v. Glary*, Kirby, 313; *Smith v. Spinola*, 2 Johns. 198; *White v. Caulfield*, 7 Id. 117; *Emory v. Greenough*, 3 Dall. 369; *Payne v. Dudley*, 1 Wash. 199; *Ex parte Ward*, 1 Atk. 153; and he contended that voluntary assignments for the benefit of creditors ought to be looked upon with suspicion, and could not be treated as valid with respect to property which had not been delivered to the assignees.

Dick, United States attorney, in reply, reviewed the authorities cited by the other counsel, and insisted that a voluntary assignment transferred property situate out of the country where it was made, because: 1. Personal property is always governed by the *lex loci* of the country where the owner has his domicile; 2. Personal property always draws its possession to its owner; 3. Possession is excused where the property is in another country.

By Court, MATHEWS, J. On the part of the assignees, it is contended, that the deed of assignment is good and valid, according to the laws of Maryland, under which it was executed, and the contract was made, and it ought to be enforced by the court of this state. To this end, they liken it to an assignment, made under the bankrupt laws of England, and cite adjudged cases from the courts of justice of that country, showing how strictly and extensively they are carried into effect.

Were it necessary to a proper decision of this case, we are of opinion that it would not be difficult to show such a difference between assignments, made at the mere will and pleasure of debtors, in which they attempt to lay down rules for the payment of their debts, and the distribution of their estates, and those which are fairly executed under a commission of bankruptcy, as would require the application of principles almost totally different in different cases.

In assignments under a commission of bankruptcy, great pains are taken to discover and collect all the debtor's property. The assignees are chosen by the mass of his creditors, and the effect of the assignment is fixed by law. The proceeds of the

estate are to be paid and distributed according to established and known rules. But in voluntary assignments by debtors, they choose their own trustees, determine the manner in which their debts are to be paid, and too often attempt to give illegal and unjust preferences. These points we deem it useless now to discuss; and it is believed that our decision must be directed by the principles of law recognized in the case of *Dumford v. Brooks's Syndics*, 3 Martin, 222, 269.

The instrument by which the debtor undertakes to transfer his property to the trustees, must be considered as a contract between him and the persons entrusted with the execution of his intentions, in regard to the payment of his debts and the distribution of his estate. If his conduct has been fair, and his intention honest in this transaction (which we do not undertake to decide), perhaps they have a right to hold the property, as far as it has been actually delivered to them, until they shall have fully executed the trust reposed in them, and creditors who may have assented to the terms of the cession would probably be bound by it. But the assignment can certainly have no greater effect in relation to creditors not parties thereto, than a sale to a *bona fide* purchaser, which, unless accompanied by delivery, does not fully divest the seller of his property, and leaves it subject to be seized by his creditors, according to the principles laid down in the above case. The parties to the deed of assignment appear to have been aware of the impossibility of transferring by it a complete dominion over such things as choses in action, according to the common law of England, for we find in it a power granted to them to use the assignor's name, if necessary.

Upon the whole, we are of opinion that the property attached, not having been delivered to the trustees, has been regularly subjected to the payment of the debt of the attaching creditor. It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

TRANSFER OF PROPERTY IN ANOTHER JURISDICTION.—The principle of this case is a very important one, and is not yet fully settled. In Louisiana and in some other portions of the United States a change of possession ought to follow every transfer of the title to chattels which are capable of delivery. In Louisiana, because delivery is there regarded as essential to the consummation of the transfer; and, in some other states, because the retention of possession by the vendor or assignor renders the transfer *per se* fraudulent, and therefore void as against subsequent purchasers and against attaching creditors: *Freeman on Ex.* sec. 149; *Hamilton v. Russell*, 1 Cranch, 309; *Whitney v. Stark*, 8 Cal. 514; *Hodgkins v. Hook*, 23 Id. 581; *Patten v. Smith*, 5 Conn.

196; *Swift v. Thompson*, 9 Id. 63; *Hatstat v. Blakeslee*, 41 Id. 301; *Bowman v. Herring*, 4 Harr. Del. 458; *Gibson v. Love*, 4 Fla. 217; *Thornton v. Davenport*, 1 Scam. 296; *Corgan v. Frew*, 39 Ill. 31; *Prather v. Parker*, 24 Ia. 26; *Baylor v. Smith's Heirs*, 1 Litt. 105; *Waller v. Cralle*, 8 B. Mon. 11; *Lawrence v. Burnham*, 4 Nev. 361. It must be conceded that where this rule prevails a transfer made in the state of property situate therein, and between citizens thereof, is invalid unless the law respecting the delivery of the property is respected. The question is, are non-residents, having property in the state, entitled to transfer it without complying with the law of the jurisdiction in which it is situate? The courts of Louisiana have early and uniformly answered this question in the negative: *Norris v. Mumford*, 4 Mart. 20; *Fisk v. Chandler*, 7 Id. 24; *Olivier v. Townes*, 2 Id. N. S. 93; *Hughes v. Kelingender*, 14 La. An. 845. The case of *Olivier v. Townes*, 2 Mart. N. S. 93, is probably the best considered American case upon this subject. In delivering the opinion of the court, Porter, J., said: "On the facts, therefore, we have presented the case of a creditor attaching property of his debtors before it was transferred by sale and delivery, and it has been so repeatedly decided in this court, that this may be done, and that nothing short of actual delivery will defeat this right, that it would be sufficient to refer to this jurisprudence as settling the right of the parties now before us, were it not for the great pains taken by the counsel to show that this doctrine is incorrect, if extended to cases when the vendor and vendee both live in a country where a different rule on the subject of sale of movable property prevails.

"This point is not new, it was taken in the case of *Thuret et al. v. Jenkins*, 7 Martin, 318, and after a very close attention to the arguments now urged by the counsel, and the authorities relied on, we are obliged to confess that we prefer the reasoning and the law which the counsel for the appellee favored us with in the case just cited, when his professional duty required him to support the opposite doctrine from that for which he now contends.

"The position assumed in the present case is that by the laws of all civilized countries, the alienation of movable property must be determined according to the laws, rules and regulations in force where the owner's domicile is situated; hence it is insisted that, as by the law existing in the state where the vendor lived, no delivery was necessary to complete the sale, it must be considered as complete here, and that it is a violation of the principle just referred to, to apply to the contract rules which are peculiar to our jurisprudence, and different from those contemplated by the parties to the contract.

"We readily yield an assent to the general doctrine for which the appellee contends. He has supported it by a variety of authorities drawn from different systems of jurisprudence. But some of those very books furnish also the exception on which we think this case must be decided, namely, that 'when those laws clash with and interfere with the rights of the citizen of the countries where the parties to the contract seek to enforce it, as one or other of them must give way, those prevailing where the relief is sought must have the preference.' Such is the language of the English book to which we have been referred, and Huberus, whose authority is more frequently resorted to on this subject than any other writer, because he has treated it more extensively and with greater ability, tells us in his treatise *de conflictu legum*, '*effecta contractuum certo loco initiorum, pro jure loci illius alicubi quoque observantur si nullum inde civibus alienis creetur prejudicium, a jure sibi quæsitum*' 'The effects of a contract entered into at any place, will be allowed according

to the laws of that place, in other countries if no inconvenience results therefrom to the citizens of that other country with respect to the law which they demand.' This distinction appears to us founded on the soundest reasons. The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted on her own citizens, otherwise justice would be sacrificed to courtesy, nor can the foreigner or stranger complain of this, if he sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has a right to regulate. A strong evidence of this is furnished by the doctrine in regard to successions. The general principle is, that the personal property must be distributed according to the law of the state where the testator dies, but so far as it concerns creditors, it is governed by the law of the country where the property is situated. If an Englishman or a Frenchman die abroad, and leaves effects here, we regulate the order in which his debts are paid by our jurisprudence, not that of his domicile.

"Upon the principle that all contracts in regard to personal property must be regulated by the *lex loci* where the owner resides, a very important question has been agitated in several of our sister states and in the supreme court of the union: whether a legal assignment under the bankrupt acts vest the movable effects situate in another country in the assignees, so as to defeat an attachment laid by a particular creditor; as the decisions which have been given on these cases are founded on the doctrine of international law they are entitled to great respect, and the questions involved in them have a direct bearing on the case now before us. In Pennsylvania, Maryland, and in the supreme court of the United States, it has been decided that such an assignment does not vest the property in the assignees. The chancellor of New York, in a very elaborate opinion lately delivered, lays down a different rule. But it may be remarked that he proceeds on the idea that it is no injury to the citizens of New York that such a rule should prevail; that the great principle of bankrupt laws is, justice founded on equality, etc.; that it is the interest of all nations to recognize and enforce them. It is not necessary for us to say whether in the case put this view be correct or not. Certain we are that the great doctrine must be received with the limitation already noticed. We have been unable to find anything deserving the name of authority that does not recognize it. Chief Justice Parsons, in delivering the opinion of the supreme court of Massachusetts, says, 'to give effect to contracts made in another state is an act of comity due from the courts of the state in which such contract may be sued, to the state in which they may be made,' but the rule he adds is subject to two important exceptions, the first of which is, that neither the state nor its citizens suffers any inconvenience by giving the contract effect: Huberus *De Conflictu Legum*, Lib. 1, Tit. 3, no. 11; Merlin, *questions de droit*, vol. 2, p. 451; 1 Gall. 375; 5 East, 131; 6 Binn. 353; 5 Cranch, 299; 2 Mass. 84; 6 Id. 358; 2 H. Bl. 405; 7 Martin, 318; 3 Id. 222; 4 Id. 25; 5 Id. 23; 7 Id. 24; 9 Id. 296, 403; 4 Johns. Ch. 460.

"We proceed to examine whether giving effect to the laws of Virginia on the contract now set up, would be working an injury to this state or its citizens. In doing this we must look to the general doctrine, and the effect it would have on our ordinary transactions, as well as its operation in this particular case. If we held here that this sale can defeat the attachment, we should, on the same principle, be obliged to decide that the claimant would

nold the object sold in preference to a second purchaser to whom it was delivered. The rule being that when the debtor can sell and give to the buyer a good title, the creditor can seize, or in other words where the first sale is not complete as to third persons, the creditor may attach and acquire a lien: *McNeill v. Glass*, Martin, New Series, vol. 1, 261. In relation to movable property, our law has provided that delivery is essential to complete the contract of sale as to third parties. This valuable provision by which all our citizens are bound in their dealings, protects them from the frauds to which they would be daily subject were they liable to be affected by previous contracts not followed by the giving of possession. The exemption contended for here, in behalf of the residents of another state, would deprive them of that protection wherever their rights, as purchasers, came in contact with strangers; a protection which it may be remarked, it is of the utmost importance, owing to our peculiar position, we should carefully maintain. This city is becoming a vast storehouse for merchandise sent from abroad, owned by non-residents, and deposited here for sale, and our most important commercial transactions are in relation to property so situated. If the purchasers of it should be affected by all the previous contracts made at the owner's domicile, although unaccompanied by delivery, it is easy to see to what impositions such a doctrine would lead, to what inconvenience it would expose us, and how severely it would check and embarrass our dealings. However anxious we may be to extend courtesy, and afford protection to the people of other countries who come themselves, or send their property within our jurisdiction, we cannot indulge our feelings so far as to give a decision that would let in such consequences as we have just spoken of. It would be giving to the foreign purchaser an advantage which the resident has not, and that, frequently, at the expense of the latter. This, in the language of the law, we think would be a great inconvenience to the citizens of this state, and therefore we cannot sanction it."

The judgment of the courts of Louisiana upon this subject has, in at least one instance, been, not merely questioned, but utterly disregarded by the English tribunals. A British ship, the *Warbler*, registered in Liverpool, was, by a bill of sale duly registered in Liverpool, mortgaged by the firm of Klingender Brothers to Joseph Langdon, as trustee for the bank of Liverpool. The ship was then sent to New Orleans, where she was attached and sold by an English creditor of the Klingender Brothers. An agent of the mortgagees intervened in Louisiana, and attempted, without success, to prevent the sale. Fogo became the purchaser, and in March, 1860, arrived with the ship at Liverpool. The mortgagees at once filed their bill. The case came on for decision before Vice-chancellor Wood, who treated the proceedings in Louisiana as having no effect beyond transferring the mortgagor's equity of redemption. He admitted that as to real estate, the legal title to property throughout the globe cannot be acquired except it be acquired according to the laws of that country in which the real estate is situated, with respect to the transfer of real property according to that law which prevails in the locality of the property itself, called the *lex loci rei sitæ*, the common phrase of jurists. He, however, insisted that with regard to movables, the *lex loci rei sitæ* would, in most instances, have no operation; and further that the peculiar doctrines of the courts of Louisiana on this subject had encountered the opposition of eminent American and European jurists. He laid great stress upon the fact that the creditor, the mortgagee and mortgagors were all citizens of England, where the mortgage was perfectly valid, and in conclusion gave the same effect to the mortgage as though the pro-

ceedings and sale in New Orleans had never taken place: *Simpson v. Fogo*, 1 Hen. & M. 195; 9 Jur. N. S. 403; 32 L. J. Ch. 249; 11 W. R. 418; 8 L. T. N. S. 61. A subsequent decision in the house of lords has very much shaken the authority of *Simpson v. Fogo*. In this subsequent case the rule is clearly stated that judicial proceedings taking place in a foreign country, in good faith, must be respected in England, though founded upon a misconception of English law: *Castrique v. Imrie* L. R. 4 E. & L. App. Cas. 414; and the case of *Cammell v. Sewell*, 5 H. & N. 746, to the effect that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere," is cited with approval.

But in *Ramsey v. Stevenson* the property of the assignor seems to have been situate in Louisiana at the time of the assignment, and to have been seized there by attaching creditors before the assignees had reduced it to their possession. Under such circumstances there can be no doubt of the correctness of the judgment. Certainly every state and country may and ought to make rules which shall subject all property within its jurisdiction to the claims of the creditors of its owners; and no state can be compelled with respect to such property and creditors to abdicate its own legislative authority and accept such laws as may be imposed by the legislature of the foreign state in which the owner of the property may happen either temporarily or permanently to reside: *Brent v. Shouse*, 15 La. An. 110; *Fell v. Darden*, 17 Id. 236; *Skiff v. Solace*, 23 Vt. 280; *Ingraham v. Geyer*, 13 Mass. 146; *Guillander v. Howell*, 35 N. Y. 657; *Fuller v. Steiglitz*, 27 Oh. St. 355; 22 Am. R. 312; *Lanfear v. Sumner*, 17 Mass. 110; *Green v. Van Buskirk*, 7 Wall. 139; *Dunlap v. Rogers*, 47 N. H. 287; *Beirne v. Patten*, 17 Low. 589; *Moye v. Way*, 8 Ired. Eq. 131; Wharton's Conf. Laws, secs. 337-353; *Johnson v. Parker*, 4 Bush, 149; Story's Conf. Laws, sec. 390; *Price v. Morgan*, 7 Mart. 707. Upon a review of the foregoing authorities, as well as of the most recent English decisions, we think that the old rule that movables follow the person of their owner, and are governed by the law of his domicile, is now subject to many well-established exceptions; and that it will scarcely, if ever, be permitted to operate where the law of the owner's domicile is necessarily repugnant to that of the place in which his goods are situate. Choses in action follow their owner. If they are assigned by a transfer valid where he lives, they may be collected by suit in another state, although the transfer, if governed by the laws of that state, would be invalid: *Fuller v. Steiglitz*, 27 Oh. St. 355; 22 Am. R. 312; *Guillander v. Howell*, 35 N. Y. 657; *Speed v. May*, 17 Pa. St. 91; *Levy v. Levy*, 78 Id. 507; 21 Am. R. 35. In Vermont the rule of the Louisiana cases is not disputed, but it is maintained, and we think properly, that the rule does not apply when property is wrongfully taken out of the jurisdiction in which its owner resides: *Taylor v. Boardman*, 25 Vt. 589. In Louisiana an exception is made where a vessel on the high seas is assigned by a non-resident. In such a case a non-resident creditor cannot attach the vessel merely because there has been no delivery of possession: *Southern Bank v. Wood*, 14 La. An. 554.

Regarding the effect of assignments made under foreign bankruptcy laws: see *Dawes v. Boylston*, 6 Am. Dec. 72; *Milne v. Morton*, Id. 466; *Michel v. McMillen*, Id. 690; *Holmes v. Remsen*, 8 Id. 581. Voluntary assignment made in another state, see *Ingraham v. Geyer*, 7 Am. Dec. 132.

MURPHY v. MURPHY

[5 MARTIN, 83.]

CONFLICT OF LAWS—MARITAL RIGHTS.—A husband and wife, on removing from the country where they were married, are governed, as to subsequent acquisitions of property, by the laws of the country to which they have removed, unless in their contract of marriage, they have stipulated that some other law shall prevail.

CESSATION OF COMMUNITY OF GOODS takes place at the death of the wife.

APPEAL from the court of probates of the parish of Orleans.

By Court, DERRIGNY, J. The plaintiffs and appellants are the legitimate children of the late Don Diego Murphy, consul of Spain at New Orleans, and of Mary Creagh, his first wife, between whom there existed a community of goods. They pretend that, no steps having been taken since the death of their mother to cause that community to cease, it has continued between them, their father and the defendant, his second wife; and that the estate left at the death of their father, ought to be divided accordingly.

The material facts in the case are these: In the year 1789, Don Diego Murphy, being then at Cape Francois, in the island of Hispaniola, married the mother of the appellants, Mary Creagh. The contract of marriage stipulates a community of acquets and gains between the parties, to be regulated by the custom of Paris, even though they should afterwards reside in countries where different laws should prevail. Some years after, they came to live at Charleston, South Carolina, where Mary Creagh died, leaving three infant children, the present appellants. Don Diego Murphy afterwards married Louise Peyre, the present defendant. In their contract of marriage, a community of goods is also stipulated, and a clause is introduced, whereby Don Diego Murphy binds himself to fulfill the necessary formalities to put an end to the community, which he acknowledges has continued to subsist between him and his children of the first marriage. It appears by oral testimony that shortly after this second contract had been celebrated, he caused an inventory of his estate to be made, the legality of which is disputed.

The first and most important question which presents itself here is, whether the community which existed between Don Diego Murphy and his first wife did really continue, after her death, between him and his children. The better to understand the principle on which turns the decision of this point, we shall

first consider what would have been the situation of Don Diego Murphy and his first wife if they had married without any contract. It has already been made a question in this court, in the case of *Gale v. Davis's heirs*, 4 Mart. 645, whether the law of the place where a marriage is celebrated is to follow the married couple wherever they go, and to regulate their respective interests everywhere; and it was decided upon the authorities there cited, that when a married couple emigrate from the country where their marriage took place into another, the laws of which are different, the property which they acquire in the place where they have moved, is governed by the laws of that place. Hence, if Don Diego Murphy and his first wife had married without contract at Cape Francois, and afterwards transferred their domicile to Charleston, we would have no hesitation to say that the community would have ceased from the moment of their arrival at Charleston, and that the property thereafter acquired would have belonged to the husband alone.

But the parties had entered into a contract by which it was stipulated that there should be between them a community of goods, to be regulated by the custom of Paris wherever they should go. That contract was their law, and provided it was not to cause any prejudice to the citizens of the country where they went to reside, and its execution was not incompatible with the laws of that country, it was to be maintained. By virtue of that contract, therefore, the community of goods stipulated by the parties subsisted at Charleston until the death of the wife. Did it survive her, and continue to have effect between the husband and his children?

To put this question in a clear point of view, we must distinguish between the rights which derive from the contract of marriage in favor of the heirs of the wife, and the rights which are granted by law to the heirs of either party. The rights which derive from the contract are those of accepting or refusing the community as it stood at the dissolution of the marriage, and in case of renunciation to retake all the property of the wife free from debts. The right granted by law to the heirs of either the wife or the husband, is that of continuing to be in partnership with the survivor, if they please, in case he or she should neglect to make an inventory of the property left at the death of his or her partner. This right, so far from being the consequence of a contract, is given by the custom of Paris to the children whether there be a contract or not. Let us apply this distinction to the present case. Murphy and his first wife,

by virtue of their contract of marriage, continued to be in community of goods even after their removal to a country where a different law prevailed; that stipulated partnership between them lasted as long as their marriage; upon the dissolution of the marriage there was an end to the community by contract. What could make that community continue between her children and their father? The law. But that law does not prevail in the country which the parties then inhabited. The forcible consequence is that the community did not survive the mother of the appellants.

The belief which Don Diego Murphy and his second wife, the defendant, seem to have entertained that the community was continuing between him and his children at the time of their marriage, does not alter the situation of the case. If under that belief they had done some act, if, for example, they had allowed to the plaintiffs more than they were entitled to, perhaps they could not even recover it back, according to the maxim that no relief is granted against an error of law. But here things are entire. The mere expression of their belief cannot be deemed of any account.

The situation in which the community stood at the time of Mary Creagh's death is left in the dark, the plaintiffs having made no effort to adduce any evidence on the subject. From the testimony produced by the defendant, it appears that at the epoch of her marriage, Don Diego Murphy possessed no real estate, and hardly personal estate enough to pay to his children the dowry of their mother. We must take the evidence as it is, and conclude that the community between him and Mary Creagh had made no gains.

The claim of the appellants must therefore be reduced to the dowry, or marriage portion of their mother, and their share in their father's succession, which is to be composed of his half of the property, inventoried and collected according to the account rendered by his testamentary executors, deduction being first made of the marriage portion of Mary Creagh, and of the marriage portion, *douaire et préciput*, of the defendant.

A difficulty has occurred as to the manner of calculating the marriage portion of Mary Creagh. It is called ten thousand livres, and the appellants contend that these are *livres tournois* of the currency of France, the mother kingdom of the then colony of St. Domingo, when the contract was celebrated. We are however satisfied from what has been shown to the court, that the livres must be understood according to the St. Domingo currency.

Upon the whole we have found nothing to redress in the judgment appealed from.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

CONTRACTS OF MARRIAGE generally continue of binding obligation on the parties thereto, although they may subsequently become permanent residents of another state or country: *Story's Conf. of Laws*, secs. 143, 178; *Anastather v. Adair*, 2 Mylne & K. 513; *Decouche v. Savetier*, 3 Johns. Ch. 190; 8 Am. Dec. 478; *Saul v. His Creditors*, 17 Mart. 605. So natives of a country may, while absent therefrom, enter into an antenuptial contract in view of their intended return to their native land, and, where they so contract, their rights of property under the contract and their marriage in pursuance thereof, will be controlled by the laws of the country with reference to which the contract was made: *Le Breton v. Miles*, 8 Pai. 261. But, on the other hand, it has been determined that the residents of a country, about to contract marriage there, cannot make a valid stipulation subjecting their property rights to the law of a foreign country: *Bourcier v. Lasuses*, 3 Mart. 581.

REMOVAL AFTER MARRIAGE.—“The domicile of the husband and wife, at the period of their marriage, may be considered as affecting the question whether property acquired in or removed to some other state than that in which the marriage was celebrated, is to be governed by the law of the matrimonial or of the actual domicile. Foreign jurists have never been able to agree as to whether the rights of the spouses are controlled by the law of the matrimonial domicile, or are subject to the laws of the state or nation in which the spouses may, from time to time, choose to take up their residence. The American adjudications on this subject are nearly all embraced in the decisions of the courts of the state of Louisiana. By these decisions the rights of the spouses immigrating to that state are, in the absence of any contract, governed, as to all subsequent acquisitions, by the laws of Louisiana, and as to all prior acquisitions by the law of the country in which such acquisitions were realized. Parties marrying with the intention of removing to another state, are supposed to have designed that their marital rights should be subject to the laws of such state. Therefore persons who, at their marriage, intend going to Louisiana to reside, are there treated as subject to the law of community:” *Freeman on Co-tenancy and Partition*, sec. 132. In Lower Canada different rules prevail. Parties marrying, where the law of community does not prevail, are not entitled to its benefits on settling in Lower Canada: *Rogers v. Rogers*, 3 Lower Canada Jur. 64; and if married in Lower Canada, they are treated as subject to the law of community after their removal elsewhere: *Laviolette v. Martin*, 11 L. C. Rep. 254. That an antenuptial agreement may control the property rights of the spouses after their removal to another country is nowhere directly denied. The tendency, however, is to limit the effect of such agreements, as far as may be, without altogether ignoring them. Hence the courts of the country to which the removal has taken place will apply the laws of that country to the property there acquired, unless it is manifest from the terms of the antenuptial contract that the parties contemplated the removal, or clearly intended that their contract should continue to bind them wherever they should go: *Castro v. Illies*, 22 Tex. 479; *Fuss v. Fuss*, 24 Wis. 256; *Besse v. Pellochoux*, 73 Ill. 285; 24 Am. R. 242.

CONTRACT MADE BY MARRIED WOMEN IN ANOTHER STATE.—A novel case was recently determined in Massachusetts. A married woman, at her home in Massachusetts, executed a contract, and gave it to her husband, to be by him sent by mail to Portland, Maine. The contract purported to guarantee the payment by her husband of five hundred dollars to a firm doing business at Portland. The guaranty was received by the firm in Portland, and was subsequently sued upon by them. It was invalid under the laws of Massachusetts, where the *feme-covert* resided, and was sued, but was valid according to the laws of Maine. The court, on the authority of *Scudder v. Union National Bank*, 91 U. S. 406; S. C. 2 Cent. L. J. 827, held, that the validity of the contract must be determined by the laws of the state where it was made; that the contract was not made until it was received and acted upon in Maine, and, therefore, that its validity depended on the laws of that state. The general rule "often stated by commentators, that the law of the domicile, regulating the capacity of a person, accompanies and governs the person everywhere," was considered by the court, and after a very exhaustive review of the authorities, this rule was held not to govern the case; indeed a rule the very reverse of it was adopted, viz.: that the capacity of a person to contract must be determined by the law, not of his domicile, but of the county in which the contract is made: *Milliken v. Pratt*, 8 Cent. L. J. 500, citing upon this point, *Male v. Roberts*, 3 Esp. 163; *Thompson v. Ketcham*, 8 Johns. 189; 5 Am. Dec. 329; *In re Hellman's Will*, L. R. 2 Eq. 363; *Baldwin v. Gray*, 16 Mart. 192; *Andrews v. His Creditors*, 11 La. An. 464; *Pearl v. Hansborough*, 9 Humph. 426.

TODD v. LANDRY.

[5 MARTIN, 459.]

THE REPEAL OF A STATUTE giving jurisdiction to a court deprives it of the right to pronounce judgment in a proceeding previously pending.

APPEAL from the parish court of Ascension. The action was brought to recover a sum claimed to be due for the building of levees, for work done under an act which was repealed on the eighth of February, 1817.

By Court, MATHEWS, J. The act of the legislature, on which this action is brought, in the cases for which it provides (and of which the present is one), extended the jurisdiction of the parish courts, and authorizes an appeal directly to this. But it has been repealed *in toto* by an act bearing date of the eighth of February, 1817, which was pleaded to the jurisdiction of the court below by the defendant, and not denied by the plaintiff, to be in force at the time it was pleaded.

The repealing act being in force before the parish court gave judgment in the cause, and the jurisdiction of that court depending entirely on the repealed one, it is clear that the latter had ceased to exist, and that the court erred in sustaining its jurisdiction in the case.

It is, therefore, ordered, adjudged, and decreed that the judgment be annulled, avoided, and reversed; and this court proceeding to give such a judgment as in their opinion ought to have been rendered in the court *a quo*, it is ordered, adjudged and decreed that the plaintiff's petition be dismissed with costs.

THE EFFECT OF THE REPEAL OF A STATUTE is "to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law:" *Ex parte McCordle*, 7 Wall. 514; *Key v. Goodwin*, 4 Moore & P. 341; *Thorne v. San Francisco*, 4 Cal. 165; *Van Inwagen v. Chicago*, 61 Ill. 31; *Musgrove v. V. and N. R. R. Co.*, 50 Miss. 677; *Town of Belvidere v. Warren R. R. Co.*, 34 N. J. L. 193. Pending judicial proceedings based upon a statute cannot proceed after its repeal: *Gilleland v. Schuyler*, 9 Kans. 569; *Wade v. St Mary's School*, 43 Md. 178; *McMinn v. Bliss*, 31 Cal. 122; *State v. Daley*, 29 Conn. 272. This rule holds true until the proceedings have reached a final judgment in the court of last resort, for this court, when it comes to pronounce its decision, conforms it to the law then existing, and may, therefore, reverse a judgment which was correct when pronounced in the subordinate tribunal whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal: *Hartung v. People*, 22 N. Y. 95; *Hubbard v. The State*, 2 Tex. App. 506; *Montgomery v. The State*, Id. 618; *Shepard v. The State*, 1 Id. 522; *Atwell v. Grant*, 11 Md. 104; *Price v. Nesbitt*, 30 Id. 263; *United States v. Peggy*, 1 Cranch, 103; *Mayor of Annapolis v. Maryland*, 30 Md. 112. In one instance a judgment erroneous when pronounced was affirmed, because the subsequent repeal of the statute freed it from error: *Musgrove v. V. and N. R. R. Co.*, 50 Miss. 677. Another court having affirmed a judgment in ignorance of the repeal of a statute, pending the appeal, afterwards, at the same term, on its attention being called to the repeal, struck out the affirmation, and in its place entered a judgment of reversal: *Keller v. The State*, 12 Md. 323.

It is with reference to statutes defining crimes and providing their punishment, that repeals operate with the utmost freedom. In such cases the extinction of the statute is understood as an indication that the sovereign power no longer desires the former crime to be punished or regarded as criminal. Therefore, though an act when committed, be criminal, it can not be punished if, before conviction therefor, the statute making it a crime be repealed: *Mayor of Annapolis v. Maryland*, 30 Md. 112; *Keller v. The State*, 12 Md. 323; *State v. Brewer*, 22 La. An. 273; *Wall v. State*, 18 Tex. 682; *Heald v. The State*, 36 Me. 62; *Rood v. C. M. and St. P. R. W. Co.*, 43 Wis. 146; *Town of Belvidere v. Warren*, 34 N. J. L. 193. Hence if a statute giving plaintiff double damages or any damages in excess of those which he has actually sustained, be repealed he cannot thereafter recover anything in

excess of the damages which he has actually suffered: *Bay City & E. S. R. R. v. Austin*, 21 Mich. 390; *Seymour v. McCormick*, 16 How. U. S. 480. In New York it has been said that the instant a thing is done the penalty awarded by law becomes a debt or duty vested in the person entitled thereto; that it "is in the nature of a satisfaction to him as well as a punishment to the offender," and, therefore, that a statute abolishing the penalty can not operate so as to affect a pre-existing claim or right thereto: *Palmer v. Conly*, 4 Den. 374; S. C. on appeal, *Conly v. Palmer*, 2 N. Y. 182. But, we apprehend, that these cases are in effect overruled by *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 656, where it is clearly shown that full satisfaction is made to a party when he receives compensation proportionate to the wrong done him, and that all which the law gives in excess of that sum is necessarily in the nature not of debt, but of penalty or punishment. The repeal of a usury law relieves from forfeitures already incurred under it: *Wood v. Kennedy*, 19 Ind. 68; *Welch v. Wadsworth*, 30 Conn. 149.

But vested rights and the obligation of contracts cannot, in this country, be destroyed by legislative action, whether affirmative or negative, whether in the enactment or the repeal of statutes. Inchoate rights resting upon statutes may be terminated by an appeal: *Van Inooyen v. Chicago*, 61 Ill. 31; *Buller v. Palmer*, 1 Hill. 342. But rights which have become perfect under a statute may be enforced notwithstanding its subsequent repeal: *Prusseaux v. Welch*, 2 West. L. M. 209; *Sinking Fund Commrs. v. Northern Bank*, 1 Mot. Ky. 174; *Rice v. Railroad Co.*, 1 Black, 358; *Ex parte Graham*, 13 Rich. Law. 277; *Streubel v. Milwaukee*, 13 Wis. 67; *Creighton v. Pragg*, 21 Cal. 115. An assessment having been fully perfected so as to constitute a cause of action against the persons assessed, was enforced after the repeal of the act by which it was authorized: *Town of Belvidere v. Warren*, 34 N. J. L. 193. We doubt the correctness of this decision unless contracts had been made or other vested rights accrued under the statute: *Tivey v. People*, 8 Mich. 128. Under a statute of California, a vessel when spoken by a pilot and his services declined, was liable to him for half pilotage fees. While this statute was in force a vessel was spoken by a pilot and his services were declined. The statute was subsequently repealed, and thereafter it was contended that the claim of the pilot, as it rested upon an extinct statute, could no longer be maintained. The supreme court of the United States, nevertheless deeming the obligation to be in the nature of an implied contract, protected and enforced it, saying: "The claim of the plaintiff below for half pilotage fees, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen under a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute." *Steamship Company v. Joliffe*, 2 Wall. 457. No person has a vested right in a particular remedy. Hence, by the repeal of a statute the particular remedy authorized by it may be altogether withdrawn: *Musgrove v. F. & N. R. R. Co.*, 50 Miss. 677; *McMinn v. Bliss*, 31 Cal. 122. This we conceive, can not be true to the extent of withdrawing all efficient remedy for the enforcement of a contract.

BOGGS v. REED.

[5 MARTIN, 673.]

FOREIGN LAWS, and the laws of other states, are not judicially noticed but must be proved.

APPEAL from the court of the sixth district.

By Court, MARTIN, J. In this case, the plaintiff offered in evidence the depositions of John Carlisle and John McCoy, of the state of Ohio, to prove the legal interest in that state, on promissory notes, where no interest is expressed therein, which was objected to by the defendant. The district court was of opinion that no interest was allowed at common law, more particularly where none was mentioned in the contract; that therefore it was presumable that interest was allowed in the state of Ohio by statute; that parol evidence of the statute could not be admitted, and rejected the evidence. To this opinion the plaintiff excepted, and there being judgment for him for the principal, without interest, he appealed. The case stands before us on the bill of exceptions only.

We think the district court erred in assuming it as a fact that interest cannot be allowed under the common law of the state of Ohio. The knowledge which the judges of the courts of the state of Louisiana have of the laws of their own state, and of those of the United States, must direct their opinions and their conduct. The laws of other states must be proven before them in every case in which it is proper they should influence their opinion. No country is believed to exist in which every title of the law is reduced to a text. The memories of the members of this court do not enable them to cite any country in which some part of the law is not unwritten. We have no official means of information that may enable us to conclude that the people of the state of Ohio are without unwritten law. We therefore conclude that the witnesses offered by the plaintiff ought to have been heard.

The judgment of the district court is therefore annulled, avoided and reversed, and the cause is remanded for a new trial, with directions to the district court to hear the witnesses offered; and it is ordered, that the costs of this appeal be borne by the appellant.

See *State v. Twitty*, 11 Am. Dec. 779, and note thereto.

RION v. GILLY.

[6 MARTIN, 417.]

ACCEPTING THE FINAL ACCOUNT of a factor, without objection, discharges him from all further liability to account for sales made by him on a credit, the proceeds of which he has not collected.

APPEAL from the court of the parish and city of New Orleans.

By Court, DERBIGNY, J. The plaintiff and appellant delivered to the defendants a quantity of coffee to be sold for his account, and he complains that they were remiss and negligent in the transaction; but he admits that they finally rendered him an account, which he accepted. The object of the present suit is to obtain the balance due to the plaintiff on that account. On the face of it, this balance results from outstanding debts, which the defendants allege that they have not collected.

We are of opinion that by accepting a general account of the whole transaction, including the commission of the defendants, and in which are expressed what accounts have been, and what remains to be, collected, the plaintiff discharged the defendants; that their agency, from that moment, was at an end, and that he has now no right to call upon them for payment of any item, which he complains that they neglected to collect.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

RALSTON v. BARCLAY.

[6 MARTIN, 649.]

LIABILITY OF JOINT OWNERS.—A part owner of a ship is answerable to his co-owner for ordinary negligence, and for not taking such care of his co-owner's property as he takes of his own.

APPEAL. The opinion states the case.

By Court, MATHEWS, J. [after disposing of a question of local pleading and practice]. In relation to the merits of the case, the evidence shows that the plaintiff and defendants were joint owners of the ship *Alpheus*, which, by her register, stood in the name of the defendants, who acted as ship's husbands; that they have been in the practice of insuring the ship at her full value, thereby securing the interest of the plaintiff and their own, until a voyage attempted to be made in 1816, in

which she was lost, wherein they had only insured one half of her value, which they claimed for their own benefit. It is further shown in evidence, that the plaintiff, in 1815, shipped on board of said ship, and consigned to the defendants three hundred bales of cotton and thirty hogsheads of tobacco, from New Orleans to Liverpool, and requested the defendants to have insurance made thereon; that the letter advising them of the shipment, and containing a request to have insurance effected, was received only two days before the arrival of the ship at Liverpool. These are the only important facts, established by the testimony on the part of the plaintiff, as connected with the charges in his account.

The first is opposed by the defendants on the ground of want of instructions to insure; and the second, on that of having faithfully and honestly complied with the plaintiff's request by insuring his cotton and tobacco, paying the premium, etc. On this latter charge against the defendants the only question which arises is one of fact, and according to the whole testimony relating to it we see no reason to differ from the opinion of the jury expressed in their verdict.

The plaintiff's right to recover, on account of the alleged neglect of the defendants in not causing his interest in the ship to be insured, depends more upon legal questions. The evidence in the cause shows most clearly that the plaintiff and defendants were joint owners and partners in the ship, of which the latter had the exclusive possession, care and management. According to the law *contractus quidem* of the Roman digest, they are answerable to the plaintiff for ordinary negligence. They were bound to take the same care of his interest in the common property which they did of their own. This they have not done; having failed to insure him whilst they did for themselves. They are liable, also, on another ground: having been in the practice of insuring the plaintiff's interest in the ship as well as their own, it is to be presumed that for that purpose they had proper authority, and could not legally decline performing the same service without making the circumstance known to him: Domat, 1, 15, sec. 4, art. 4.

As to the plaintiff's claim for a difference in the price, we are of opinion, that it is not supported by the evidence.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed, and that each party pay his own costs in this court.

LIABILITY OF CO-OWNERS.—Cases may be found in open hostility to the spirit of the foregoing decision. These cases exonerate part owners from all liability to their co-owners for damages arising from a negligent or careless use of the common property: *Hall v. Fisher*, 20 Barb. 448; *Moody v. Buck*, 1 Sandf. S. C. 308. The weight of the authorities is against these cases. A co-tenant, who so negligently or carelessly manages the common property as to occasion its destruction or material injury, is, we think, responsible to his co-tenants therefor: Freeman on Co-tenancy and Partition, secs. 266, 335; *Chesley v. Thompson*, 3 N. H. 9; *Guillot v. Dossat*, 4 Mart. 203; *Herrin v. Eaton*, 13 Me. 196; *Sheldon v. Skinner*, 4 Wend. 525; *Martyn v. Knollys*, 8 T. R. 146.

MORTMAIN v. LEFAUX.

[6 MARTIN, 654.]

CONTRACT FOR SERVICES.—One who contracts to serve another for a specified period, cannot recover anything for serving a less period, when he terminates his service without the consent or fault of his employer.

APPEAL from the court of the parish and city of New Orleans.

By Court, **MATHEWS, J.** The plaintiff and appellee instituted this suit, to recover compensation for services rendered to the defendant, in editing a newspaper called *Le Moniteur*. He relied on a written agreement entered into by the parties, by which it was covenanted, that he should have the direction and management of the paper during the absence of the defendant from the city, or at least for the space of one year, and that the profits should be divided among them. The petition states, that he had, by great trouble and pain, procured an increase of subscribers; that he had been conducting its publication for the space of three weeks, with such diligence and discretion, as to promise considerable profit, when the defendant interfered, in violation of his contract, and insisted, in opposition to the true interest of both, on having published a piece of his own composition, in favor of monarchical power. In consequence of which interference, the plaintiff withdrew from the defendant's printing office, and refused any longer to take upon himself the care of editing the paper.

On this statement of the cause of action, taken together with the written agreement of the parties, we are of opinion that the plaintiff has no right to recover. Having, by an express stipulation, the care and direction of the manner in which the *Moniteur* should be conducted during all the time of the absence of the proprietor, or for the term of one year, whilst that period continued he was master of the press. and had as much right

to refuse the publication of any improper piece offered by the defendant, as of those presented by any other person.

He ought to have maintained his situation and standing as editor, and persisted in the fulfillment of his duties under the contract. There is nothing alleged or proven against the defendant which authorized the plaintiff to decline the performance of his engagements during the period stipulated, and to sue for damages, as on a breach committed by the defendant.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and that judgment, as in a case of nonsuit, be entered against the plaintiff and appellee, and that he pay costs in both courts.

See *McMillan v. Vanderslip*, 7 Am. Dec. 299, and *Jennings v. Camp*, Id. 367, and notes thereto.

BOUTHEMY v. DUCOURNAU.

[6 MARTIN, 657.]

INTEREST ON PURCHASE-MONEY.—A vendor who covenants to clear the property from incumbrances, is not entitled to interest on the unpaid purchase-money, until he removes the incumbrances and notifies the purchaser.

APPEAL from the court of the parish and city of New Orleans.

By Court, MATHEWS, J. This suit is brought to recover the last installment of the price of a tract of land which belonged to the estate of the deceased, and was sold by the plaintiff to the defendant. The act of sale states the existence of a mortgage on the premises in favor of Berger, the vendor of Bouthemý, which the executor covenanted to have raised and canceled before the last installment should become payable. The note which was given for it was made payable on the first of March, 1815, but the vendee, in justice and equity, and according to his stipulation in the act of sale was not bound to pay till the property should be freed from the incumbrance of the mortgage in favor of Berger. The amount secured by that mortgage, as it now appears, had been paid off and discharged long before the time at which the last installment of the price became due, according to the words of the note given for its payment. But this was not made known to the register of mortgages, so as to have the mortgage regularly raised and canceled; neither was the knowledge of it communicated to the defendant and

appellant. It seems to have been a late discovery of the plaintiff and appellee himself. Payment substantially extinguishes a mortgage, and as in the present case the register had raised Berger's, in obedience to an erroneous order of the parish court, now that it is clearly ascertained to be extinct by payment, the plaintiff ought to recover.

The parish court having allowed interest on the amount adjudged from the time at which it appears to have been payable, according to the expressions in the note, it is contended against this part of the judgment, that the principal was not due till after the discharge of Berger's mortgage was explicitly made known to the defendant, and consequently no interest ought to have been allowed before that time. This knowledge does not appear to have been brought home to the defendant till the trial of the present suit. We are, therefore, of opinion that the parish court erred.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and this court proceeding to give such a judgment as, in its opinion, ought to have been given in the parish court; it is ordered, adjudged and decreed, that the plaintiff and appellee recover from the defendant and appellant two thousand and twenty-five dollars, and that the former pay costs in this court.

PLANTERS' BANK v. GEORGE.

[6 MARTIN, 670.]

WHAT WITNESSES MUST ANSWER.—A witness may be compelled to answer a question, though by so doing he may make himself liable in a civil action.

By Court, DERBIGNY, J. [The first portion relates to a question of local practice, and is therefore omitted.] The plaintiffs further complain, that a witness by them summoned was excused from answering, because the questions put to him tended to extort from him a disclosure of facts which might affect his interest, so as to make him liable to a civil suit.

Upon a question of this kind, the ancient laws of the country can afford no assistance. Laws which required torture to be inflicted on witnesses suspected of participation in a crime, to compel them to reveal their own guilt and infamy, would not be very tender in protecting a witness when his interest alone

was at stake. Such laws being at open war with the principles of a free government, must be considered as abrogated in common with all dispositions repugnant to the liberality of our institutions. Hence, as much from a tacit conviction that the former laws of evidence are sometimes adverse to the privileges of freemen, as from the introduction of the trial by jury with all its concomitants and consequences, it has grown into practice to resort, upon questions of evidence, to the principles recognized in a country where liberty directs the administration of justice.

Referring, therefore, to those doctrines, we find that in England it was long doubted whether the respect due to individual security and comfort would permit to compel a witness to disclose facts which might subject him to a civil action or charge him with a debt. Much was argued on both sides of the question, decisions were given disclaiming any right to extort such disclosures. Till at last, on a question referred by the house of lords to the twelve judges, eight of them, with the chancellor, were of opinion that, provided the facts sought to be proved did not expose the witness to any penalty or forfeiture, he was bound to disclose them, though they should eventually subject him to a civil suit.

After that solemn adjudication in a country where personal rights are so well understood, there can be no inconvenience in adhering to those principles here, where the laws which we derive from our former government are far from being so liberal: 1 Am. Law. Journ. 223.

In truth, it is difficult to conceive why in the same court where the parties themselves may be compelled to disclose the secret which may ruin their case, nay, where their silence, on such a question, is taken as an implied confession of the fact, where the prejudice to be suffered by that compulsion is certain and immediate, witnesses, called upon to avow a just debt or confess themselves liable to a just claim, should be authorized to conceal the truth to the injury of others, merely because they may eventually be exposed to pay what they justly owe.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed, and that this case be remanded, to be tried anew, with instructions to the judge to admit and suffer to go to the jury, the facts stated by the plaintiff, except such part thereof as relates to the agency of Taylor and Purdon as agents of the vessel only, and also to admit the testimony of Thomas L. Taylor, and require his answers

on all facts pertinent to the issue although the disclosure of such facts may expose him to a civil suit.

See *Tasey v. Kemp*, 7 Am. Dec. 673. It appears that the doubts existing in England about the right of a witness to decline answering where his answer might subject him to pecuniary loss, were never removed until the enactment of the statute: 46 Geo. III., ch. 37. In the United States this statute is, however, regarded as merely declaratory of the common law: 1 Greenl. Ev. sec. 452. Nor is the rule that a witness may be compelled to respond to a question when his answer would tend to expose him to pecuniary loss without qualification. He can not be compelled to expose himself to a penalty or forfeiture, nor to the forfeiture of his estate: *Id.* sec. 452, 453.

HUNT v. MORRIS.

[6 MARTIN, 676.]

DISCONTINUANCE OF SUIT.—An action not on trial before a jury cannot be discontinued without permission of the court.

LIABILITY OF CARRIER FOR LOSS BY FIRE.—Carriers for hire are, under the civil code, answerable for ordinary neglect, which is the omission of that care which men of common prudence take of their own affairs. If property on a steamboat is destroyed by fire, the owners of the boat are not responsible, if it was being navigated with proper diligence, although the accident occurred at night.

BURDEN OF PROOF.—In case of loss of property entrusted to a common carrier, the burden of showing that the loss was without his fault, rests upon him.

APPEAL. The opinion states the case.

By Court, **MATHEWS, J.** The pleadings, as they appear on the record, present a contest for decision arising in *locatione operis mercium vehendarum* or contract of hiring of the carriage of goods; and the principal question relates to the liability of carriers, according to our laws on the subject of this species of bailment.

The petition is in the usual form, and the plaintiff claims damages to the amount of the value of certain goods and merchandise contained in boxes and packages, which were placed by him on board of the steam boat *Vesuvius*, then lying in the port of New Orleans, to be carried to Natchez. He states that the goods were not delivered according to contract, but were lost and destroyed by fire on board of said boat, in consequence of the negligence and misconduct of the master and those employed under him.

Before a discussion of the merits of the case, it is necessary to dispose of a bill of exceptions taken by the plaintiff's counsel to the opinion of the district court, in denying him the privilege of discontinuing his suit; after the trial had begun, and the evidence was closed, but before the case was finally submitted to the court for decision.

If the introduction of the trial by jury, in our system of jurisprudence, necessarily brings with it all the rules of the common law of England on that subject, it is clear that a plaintiff may, at any time before the verdict of the jury is recorded, suffer a nonsuit. This practice, which at first originated in the liability of plaintiffs to be amerced where they failed in their suits, at the discretion of the king, *pro falso clamore*, since the disuse of amercements, has been continued for their benefit in cases in which they suppose that sufficient evidence has not been given to maintain their claims. Admitting that this must be an inevitable consequence of the trial by jury, it does not appear to us that an absurd inconsistency in practice should be exhibited, should a different rule prevail in cases submitted entirely to a court competent to judge them both as to law and fact wherein the discontinuance should be left to the discretion of the court. Issues of fact are not, in our system of practice, necessarily to be tried by a jury; their trial in that way depends on the option of either party; and as by the choice of a defendant, a plaintiff may have his case submitted to judges whom he would not choose, there is no palpable absurdity in allowing the opportunity, by suffering a nonsuit, to renew his action in order to have it submitted to a court or a different jury. But even should an apparent contradiction exist in practice, as it relates to the different modes of trial, by the court or a jury, arising from the various codes from which our jurisprudence is formed, it is not for us to correct it. In a former case decided in this court, we have said that after the commencement of the trial of a cause, it was discretionary with the court before whom it is pending to permit or not a discontinuance, and we see no reason now to alter this opinion: 5 Martin, 20. The Spanish law provides that after a *contestatio litis*, the plaintiff cannot discontinue or change his action *ad libitum*: Febrero, *Cinco Pricios*, 1, 2, 3, n 219.

The power exercised by courts of justice of allowing or refusing to plaintiffs leave to discontinue their actions, ought, like all other powers, to be used and directed by a sound and legal discretion, according to the particular circumstances of

each case. Why should a plaintiff, after having harassed a defendant by bringing him into court and compelled him, with great expense, to enter into his defense, be permitted to dismiss his action at any time before his judgment? Our laws, and the practice of the courts under them, give great latitude for the amendment of pleadings; continuances are obtained with facility, so as to allow the parties in an action to come fully prepared to trial, and prevent as much as possible surprise and injustice, and when neither is likely to take place, no error or want of proper discretion can be attributed to a decision which denies leave to discontinue. Whether injustice will probably be the result of such a denial, may be most clearly discovered after hearing all the evidence, as in the present case, under the circumstances of which, as they appear to us, we are of opinion that the district court did not err in refusing leave to discontinue.

The attempt of the plaintiff's counsel to discontinue his action, seems to have arisen from an apprehension that they had failed in proving sufficiently the delivery and value of the goods, although in argument they insist strongly on the fullness and legality of the proof. Whether the evidence would or would not in this respect authorize and support a judgment in favor of the plaintiff, this court will not inquire, being of opinion that, under all the circumstances of the case, even admitting full proof of the delivery and value of the goods to have been made, the defendants are not liable for the loss of the property which was destroyed by the burning of the boat.

In examining the responsibility of a carrier for hire, he must be considered as a bailee of goods for the purpose expressed in the contract, and liable under it according to the common import and meaning of such a contract, where nothing is expressed which creates an increase of obligation; and here we may lay aside all the doctrine on the subject as inapplicable, which proceeds from the principle of holding common carriers responsible like insurers. Considered simply as bailees on a contract of hiring of carriage, they are answerable for ordinary neglect, which is the omission of that care, which every man of common prudence and capable of governing a family takes of his own concerns. This is a definition and rule laid down by Sir William Jones, as founded on the plain elements of natural law, and the principles contained in the codes of different nations, on this branch of jurisprudence, which we believe to be in conformity with the provision of our own laws on this subject.

Our statute provides that "carriers and watermen may be liable for the loss or damage of things entrusted to their care, unless they can prove such loss or damage has been occasioned by accidental or uncontrollable events:" Civ. Code, 384, art. 63. The French text has the words, *cas fortuit ou force majeure*. By another article they are subjected to the same obligations and duties which are imposed on tavern-keepers: Art. 61. These are made responsible for thefts and damage done to the goods deposited with them, whether they occur by the acts of their servants or persons who frequent the tavern; they are not answerable for robbery, nor where the theft is committed after breaking open the outer door, or by any other extraordinary violence. This clause seems to relate solely to thefts of property deposited with an inn-keeper, and we cannot perceive its applicability to the present case, although relied on by the counsel of the plaintiff.

The rule by which the responsibility of carriers for loss or damage is to be ascertained, is found in the part of the code just cited. They are excused by accident or overpowering force, *cas fortuit ou force majeure*, wherever the first does not occur by their negligence, and they do not unnecessarily go in the way of the latter. In other words, if they have used that due diligence in the performance of the contract, which the nature of their situation requires. It appears, by the expressions of the code, that the accident or overpowering force must be proven by the carrier, in order to excuse his failure to perform his undertaking according to agreement. In cases where the loss or damage arises from occurrences entirely beyond the control of the carrier, such as an attack by the public enemy, a storm or tempest, it is enough for him to prove the fact, and he who claims compensation for the loss is to prove the fault or misconduct of the carrier in order to recover against him. But in those cases which are not readily supposed to happen without negligence, such as a loss by robbery, fire, etc., the carrier is bound to show that they happened without any fault or negligence on his part, which, being a negative proposition, can only be established by evidence of the ordinary care or attention usually given by diligent men on like occasions: *Curia Philippica*, 509, art. 31.

This rule gives to the plaintiff the advantage of implied or presumptive evidence on the part of the masters and owners, which they are bound to disprove by showing due diligence. How far they have succeeded in this, is to be ascertained by the evidence and circumstances of the case.

The plaintiff thought fit to place his goods on board of a steam-boat, which, being propelled through the agency of fire, must from the nature of things, be more exposed to destruction by that element, than boats which are so by the application of ordinary powers. At the time when the boat was burnt, the agent of the owners, who has become one of them since the boat was repaired, was on board as well as the master. The usual number of men skilled in this sort of navigation were employed in conducting the boat on the short trip made for the purpose of procuring wood, during which the accident happened which destroyed the boat and cargo. We are clearly of opinion, that this trip of itself does not establish such a neglect on the part of the master and agent, as will authorize a recovery against them or the owners. The circumstance under which it was undertaken, and the occurrence, whilst it was in execution, are much relied on by the counsel for the plaintiff, as showing what they term actual negligence in leaving the port late, so that the boat would probably be in the night on her return, and suffering her to get aground whilst the hands were getting in the wood.

As to the time of day in which the trip was begun, it may be observed, that all masters of steam-boats are in the constant habit of running them by night, whenever extraordinary darkness does not forbid it, and this appears to us a sufficient excuse for the conduct of the parties in the present case. The risk by fire, if there be any difference, is less by night than by day, because its commencement in any part of the boat would be more readily discovered in the dark. The circumstance of the boat being run aground, in the slight degree in which it appears from the evidence that she was, is one of these accidents which often happen in this kind of navigation, in which the boats have so frequently to approach the shores of the river, for the purpose of getting wood, and it ought not to be considered as proof of culpable negligence.

It appears, from the whole tenor of the evidence on the part of the defendants, that the master and all his men on board were in the actual performance of their respective duties when the unfortunate event occurred which involved the property of both the plaintiff and defendants in one common destruction, and that no negligence can be attributed to those who were concerned in the navigation of the boat, which was consumed together with her cargo. It is to the plaintiff *damnum absque injuria*.

It is, therefore, ordered adjudged and decreed that the judgment of the district court be affirmed with costs.

THE LIABILITY OF COMMON CARRIERS is discussed in *McClures v. Hammond*, 1 Am. Dec. 598; *Williams v. Grant*, 7 Id. 235; *Elliott v. Russell*, 6 Id. 306. The common law liability is undoubtedly more severe than that imposed by the civil code of Louisiana, as explained and applied in the foregoing decision. By the common law the carrier for hire is responsible for the loss of the property by fire unless he can show that the fire was the act of God or of the king's enemies: Wharton on Negligence, sec. 554; *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent Co.*, 5 Id. 389; *Hollister v. Nowlen*, 19 Wend. 236.

WILLIAMSON v. SMOOT.

[7 MARTIN, 31.]

SUIT BY FOREIGN CORPORATION may be maintained in the courts of this state.

ATTACHMENT AGAINST CORPORATE PROPERTY cannot be maintained in an action against a stockholder.

APPEAL. The opinion states the case.

By Court, MATHEWS, J. The plaintiffs having caused an attachment to be levied on the steamboat Alabama, the St. Stephens steamboat company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot, the defendant, owns ten of them, subscribed for by him.

The questions to be decided are: 1. Is it proper for our courts of justice to recognize, in their judicial proceedings, the company as a corporate body? 2. Can the shares or stock of any individual stockholder be legally attached?

1. The propriety or legality of one sovereign state acknowledging and favoring the rights and privileges of political bodies of another state, are opposed on the ground of their being in violation of the sovereignty of that which recognizes the acts of incorporation of the other, and to the prejudice of the rights of its citizens. It does not appear to this court that these things will of necessity result in every case from such acknowledgment and recognition. When attempts directly opposed to the sovereign power of a state and the rights of its citizens are made by the political bodies of another, they certainly ought

to be repelled, and so ought such, if made by corporations deriving their existence from the government, under which they act. But as the present claim of the St. Stephens steamboat company is not of this nature, we are of opinion that they ought to be allowed to prosecute it in their corporate capacity.

2. The existence of the claimants being recognized as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it as to make his interest attachable. The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them: Civ. Code. 88, art. 11. The court is of opinion that the district court erred in disallowing the claim of the company.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the attachment of the plaintiff and appellant be quashed, so far as it relates to the said steamboat, the Alabama, and that she be released therefrom.

SUITS BY FOREIGN CORPORATIONS.—The doctrine of this case regarding suits by foreign corporations is well sustained. Corporations may, unless some ground of public policy opposes, maintain actions without as well as within the state or county in which they were formed: *Angell & Ames on Corp.*, secs. 372-376; *Field on Corp.*, sec. 363; *Bank of Edwardsville v. Simpson*, 1 Mo. 184.

LYNCH v. POSTLETHWAITE.

[7 MARTIN, 69.]

PROOF OF EXECUTION OF DEED.—If the subscribing witness resides out of the state, the deed may be read in evidence on proving his handwriting and that of the grantor.

CONTRADICTING WITNESS.—A written report made by a witness may be read in evidence to show a discrepancy between his testimony and his prior statements.

INTEREST TO DISQUALIFY WITNESS.—A stockholder is not competent to be a witness for the corporation.

HEARSAY TESTIMONY is not admissible.

MEMBERS OF UNINCORPORATED COMPANIES are liable as partners.

TENDER OF CONVEYANCE is unnecessary where the other party had declared his unwillingness to accept it.

LEX LOCI.—Members of unincorporated companies are bound by the law of the place where the contract was made

APPEAL. The plaintiff charged that in November, 1818, at Natchez, Mississippi, the defendant, by the name of chairman and board of directors of the Natchez steamboat company, for himself and others agreed to pay sixty-five thousand dollars for the steamboat Vesuvius; that plaintiff had offered to deliver the boat, which the defendant refused to receive or pay for. The defendant pleaded: 1. A general denial; 2. Misjoinder of parties defendant, in this, that there were seventy-two other persons, naming them, who were parties to the contract with defendant; 3. That the contract was made by defendant and seventy-two others associated in a special and limited partnership; 4. That defendant and those persons are now a corporation; 5. The defendant set forth the circumstances attending the organization of the company, the choosing of directors, his own election as chairman, his negotiations as such chairman with plaintiff, that the contract was conditional, that the company was not bound to receive the boat because not satisfied with its condition. At the trial the contract was produced. It purported to be executed by plaintiff and by defendant who described himself as "chairman of the board of directors of the Natchez steamboat company," and was sealed with the private seal of the parties. The plaintiff agreed to deliver the boat in good order at New Orleans. In February, 1819, the plaintiff offered to deliver the boat, but the defendant, after having her engine examined by W. C. Withers and James Wilkinson, who made a written report, refused to receive the boat. A written report on the condition of the boat was also made by a committee consisting of Messrs. Seguin, Gorham, Withers, and Lawrence. At the trial the defendant excepted: 1. To the admission in evidence of the contract, because it was not proven by the subscribing witness, who was admitted to reside out of the state. The signatures of the defendant and the witness were proved; 2. To the reading in evidence of one of the reports for the sole purpose of lessening the credit of one of the witnesses who had joined in the report; 3. To the sustaining of an objection to a question asked Commodore Patterson, which question is shown in the opinion of the court; 4. To the exclusion of a witness who was shown to hold shares in the company; 5. To the refusal of the court to admit statements made by the clerk of the boat.

Livermore, for plaintiff. The contract is to be governed by the laws of the place where it was made: *De Mercatura*, 744; 1 *Gallison*, 375; *Huberus*, part 2, l. 1, tit. 3, §§ 1, 2, 5; *Emeri-*

gon, tom. 1, ch. 4, § 8. The form of the action and the proceedings therein must be controlled by the laws of Louisiana; Casaregis, disc. 179, n. 59. The contract was properly proved: *Prince v. Blackburne*, 2 East, 250; *Adam v. Kerr*, 1 Bos. & P. 360; 7 T. R. 265; 2 Johns. 451; 3 Id. 477. The defendant is answerable for the whole debt, and therefore the objection to want of parties is not well taken: *Rice v. Shute*, 5 Burr. 2613; *Derwent v. Wallon*, 2 Atk. 510; Mitford, 25; Civil Code, 278, art. 103; Portier, des. obl. n. 270. The defendant is bound for the whole: 1. By the obligation of his deed: *Appleton v. Binks*, 5 East, 148; *Tibbetts v. Walker*, 4 Mass. 595; *Sumner v. Williams*, 8 Mass. 162 [5 Am. Dec. 83]; *Ernst v. Bartlo*, 1 Johns. Cas. 319; *Dusenbury v. Ellis*, 3 Id. 70 [2 Am. Dec. 144]; 2. Because defendant's deed does not bind the others, and must therefore bind him: *Harrison v. Jackson*, 7 T. R. 207; *Clement v. Brush*, 3 Johns. Cas. 180; *Green v. Beals*, 2 Cai. 254; because a partner is answerable for the whole; Watson Part., 3 and 4. All conversations merged into the written agreement: 2 Pothier des obl. n. 758, 759, 762; Civil Code, 310, art. 241, 243; *Mumford v. McPherson*, 1 Johns. 418 [3 Am. Dec. 339]; *Pierson v. Hooker*, 3 Id. 68 [3 Am. Dec. 467]; *Hogg v. Smith*, 1 Taunt. 346; *Rich v. Jackson*, 4 Bro. C. C. 544; *Meres v. Ansel*, 3 Wils. 276; *Thompson v. Ketcham*, 8 Johns. 18 [5 Am. Dec. 332]. A deed need not be tendered when the purchaser refuses to accept the property. If there is no warranty nor fraud, mere representations do not affect the contract of sale: *Decuir v. Packwood*, 5 Mart. 300; *Snell v. Moses*, 1 Johns. 96; *Perry v. Aaron*, 1 Id. 129; *Mumford v. McPherson*, 1 Id. 414 [3 Am. Dec. 339]; *Chandelor v. Lopus*, Cro. Jac. 4. Sound price does not imply a warranty: *Decuir v. Packwood*, 5 Mart. 300; *Parkinson v. Lee*, 2 East, 314; *Seixas v. Woods*, 2 Cai. 48 [2 Am. Dec. 215]. If the defect is apparent, the purchaser is bound: *Schuyler v. Russ*, 2 Cai. 202.

Hawkins, for defendant. The contract should be controlled by the law of Louisiana, where it is to be executed: *Le Breton v. Nouchet*, 3 Mart. 111; *Hampton v. Brig Thaddeus*, 4 Id. 585; Civ. Code, 242, 274; 1 Pothier, obl. 176, 198, 201, 202, 203, 218. The defendant and others were partners, therefore all ought to be joined: *Rice v. Shute*, 5 Bur. 2613; Watson on Part., 419, 431. The defendant having acted avowedly as an agent, is not liable personally: 1 Pothier, obl. n. 55, 85, 86; 3 Mart. 644. The defendant and others were special partners, and are responsible only according to the special terms of

association: Civ. Code, 391, Art. 12, 13, 18; Johns. Cas. 171. The written contract produced in evidence, if justly interpreted, contains no covenant on the part of the defendant. A sound price warrants a sound commodity: 2 Bay, 380; 1 Brown's Civ. Law, 368, n. 46. The contract was not proved according to the laws of Louisiana: Civ. Code, 306, 314, art. 225, 226, 257.

By Court, MARTIN, J. Our attention in the decision of this cause is first claimed by several bills of exceptions:

1. The contract between the parties having been produced by the plaintiff's counsel subscribed and sealed by the defendant, and attested by a subscribing witness, and proof made of the handwriting of both the defendant and witness, the latter being shown to reside out of the state, the defendant's counsel objected to its being read, and the district court overruling this objection, a bill of exceptions was taken.

We are of opinion that the district court was correct. The witness being out of the jurisdiction of the state, his attendance in court could not be compelled, neither could it be before a commissioner. His testimony, thus affording the best evidence of the execution of the instrument, was not in the power of the plaintiff, who therefore was for this very reason dispensed from producing it. The defendant's signature, as it was not formally denied, was properly proven by a witness acquainted with his handwriting: *Clarke's Exs. v. Cochrane*, 3 Mart. 360.

2. The next bill of exceptions is to the opinion of the district court in ordering the reading of a report of certain individuals, appointed by the parties, offered by the plaintiff, for the sole purpose of lessening the credit due to the deposition of one of these individuals, examined as a witness for the defendant.

It appears to us that this report, although it was not sworn to, was properly admitted for the purpose of showing a discrepancy between the statement to which the witness had sworn, and that in the report which he had attested by his signature. It is in every day's practice to prove declarations made by a witness contrary to what he swears, but the use of such evidence must always be restricted to what was the avowed object of the plaintiff who offered it, viz., to lessen the credit of the witness.

3. The third bill was taken to the opinion of the court in sustaining an objection of the plaintiff's counsel to the following question put by the defendant to Commodore Patterson, a witness produced by the former, for the purpose of establishing the soundness of the Vesuvius. "If you had contracted for the

purchase of a steamboat in all respects sound and in good order, and a boat had been tendered to you, under this contract, with one third of her important timbers, including her lower futtocks, rotten, would you deem such a boat answering the description in the contract, or being in all respects sound and in good order?"

We are not apprised, by anything on the record, of the nature of the objection to which the district court judged this question liable, and we believe it ought to have been answered; although it might perhaps, which we do not determine, have been modified, so as to answer the present, by limiting the supposed case to that of a steamboat in good order, instead of extending it, as was done, to that of a boat sound and in good order. As this bill, however, was taken by the defendant, and the most favorable answer could not avail him, the stipulation being for a boat in good order, and not for one sound and in good order; we think it useless to remand the case on this account.

4. A fourth bill was taken by the defendant's counsel on the refusal to swear Charles K. Lawrence, in chief; this gentleman having on his *voire dire* declared, that about the twenty-fourth of November, 1818, he purchased ten shares in the Natchez steamboat company, and expected to pay his proportion of the price of the Vesuvius, if this court declared it to have been purchased by that company.

The interest, which this witness has in the present action, was sufficient to repel him. But it was contended that he acquired it, by his own act, after the contract now sued upon was entered into, and consequently that he could not, by so doing, deprive the defendant of the right which he had to his testimony. The record does not show whether the fact which he was called upon to establish, was anterior to his acquisition of the shares; although the circumstance of its date being particularly set forth, raises some presumption that such is the case. But the bill of exceptions is one of the defendant's, whose duty it was, if any particular circumstance entitled him to the testimony, notwithstanding the interest of the witness, to have made it clearly appear, in order to take the case out of the general rule. This we cannot presume, and are consequently bound to conclude that the district court correctly refused to swear the witness in chief, as the bill does not enable us to say that it erred. We do not, however, wish to be understood to determine that a witness who has acquired an interest by his own

act, since the party who offers him had a right to his testimony, may be sworn; a question which admits of considerable doubt: Phillips on Evidence, 99, 102.

5. The last bill is on the refusal to permit the defendant to offer in evidence what Samuel A. Bower, a witness introduced by him, had heard the clerk of the steamboat say. It is difficult to tell on what ground he could have been permitted to relate this Hearsay is not evidence.

The plea in abatement appears to us to have been correctly overruled. The defendant was personally bound by the contract. He is admitted by the pleadings to be a stockholder of the Natchez steamboat company, and he subscribed the contract. According to the common law of England, which is shown to prevail in the state of Mississippi, all the members of an unincorporated company are bound, as members of ordinary partnerships: Watson, 3. The contract is clearly shown to have been entered into by the authorized agents of the company, acting within the powers delegated to them, and cases are cited in which a partner or agent, contracting under his own seal, as the defendant did in this case, becomes personally bound.

The nature, validity and effects of this contract must be inquired into, according to the laws of the country, in which it was celebrated, even when the delivery of the thing, or the fact stipulated for is to take place abroad: 1 Gallison, 375. Were we to test this case by the laws of this state, still the defendant would be found under a liability, as a member of the company, upon a contract entered into with his consent. But he shows that, in the state of Mississippi, his plea would prevail on the principle recognized in the case of *Rice v. Shute*, viz., that a partner who is sued alone, may abate the suit, stating and naming his copartners.

The laws of this state must regulate us on this point. It is according to it that the remedy is sought for and to be administered. Here, in cases of solidary obligations (which are the joint and several obligations of the common law existing between partners), the creditor may sue either of his debtors alone, and is not bound, even on the plea of the latter, to bring all or any of the rest of the co-debtors in court. But it is contended that the act of the legislative council, 1805, 26, requires that the petition should contain the names and residences of all the parties, and that the seventy and odd persons named by the defendant in his answer were parties to the contract, and their names not being in the petition the suit must abate. The

act, in our opinion, requires the insertion in the petition of the names and residences of parties to the suit alone, not of the parties to the contract, on which the suit is grounded.

Partners cannot, by any clause in the partnership contract, alter the joint and several liability which the law imposes on them, in favor of those with whom they contract: *Watson*, 172, 234. We cannot admit that the act by which the company was incorporated, being posterior to the contract, can affect the rights of the plaintiff. On the merits, it is contended that the plaintiff ought not to recover, as he did not comply with his part of the contract by which he bound himself to deliver the boat in good order; as she had at the time her headbeam broken, her boiler leaky, and a considerable part of her main timbers defective or rotten. It is true her headbeam, a considerable piece in the machinery of a steamboat, was broken and fished. But the plaintiff shows that this was by an accident which happened since the contract was entered into; that, as soon as he heard of it he ordered a new one to be made in New York, which was on the way at the time of the tender, was offered to be delivered on its arrival, has since arrived and has been put in the place of the broken one. If, however, the plaintiff did not show anything else, this circumstance would most likely be holden as a justification on the part of the defendant in refusing the boat. But the plaintiff shows that the defendant was satisfied with the measures taken for procuring a new beam, and assured the plaintiff that if there was no other deficiency in the boat, this would be waived. Had the defendant wished to avail himself of the insufficiency of the headbeam, he ought not to have thus waived his right to object thereto. For in such a case the plaintiff might, perhaps, have procured another beam out of some steamboat on the river. We therefore think that this objection cannot prevail.

It is further contended that the boiler was old and leaky. The age of it appears to be that of the boat, and the presumption is that the vendees could not well expect a newer one. The witnesses inform us that all boilers leak and lose some steam, and that this does not appear very deficient in this respect. But, it is alleged that it was worse than it appeared, because, before the examination, the plaintiff, in order to hide its defects, caused it to be covered with a thick coat of oil and lampblack. It is in evidence that this was done, without any order from the plaintiff; that it is done at the end of every voyage, and even oftener is necessary to guard the iron from the rust, and consti-

tutes a part of what is called putting a boat in good order. Further, it is in evidence that the vendees had a fair opportunity of viewing and examining the boiler before the contract.

A considerable number of pieces of timber, which at first appeared to this court as of material importance, are shown to be defective and rotten, but on a close examination of the testimony, and more mature reflection, they think these first impressions must yield to the depositions of carpenters, masters and owners of ships, examined on this head. These, almost unanimously assert, that notwithstanding the rottenness and defects of these pieces of timber, they consider the boat to be what is understood by a boat in good order. They make a distinction, to which the court has with great reluctance yielded, between a boat in good order and a sound one. They seem to allow the epithet of sound to ships on their first voyage only, and assert that afterwards every ship has some rotten and defective timbers. Yielding, therefore, to the weight of the testimony in this respect, we are bound to say that the boat was in good order when she was tendered, if we except the absence of the new headbeam, which the defendant did not complain of, and which would, he declared, make no difference; and this piece of machinery has since been supplied within the time mentioned. Further, it is in evidence, that the old headbeam was in a condition to serve until the arrival of the new.

The contract of sale describes and ascertains the quality of the boat bargained for—a boat in good order; a worse could not have been tendered; a better cannot be insisted on.

We leave out of view, as we are bound to do, all the conversations and correspondence of the parties before the contract. The conversations cannot affect the literal evidence. Every point started in the correspondence, if it does not appear in the contract, is abandoned and merged in the written agreement.

The defendant further urges, that the plaintiff ought not to recover, because he has not proven, nor even alleged, his capacity and readiness to make the conveyance stipulated for. We think this was unnecessary. He needed not to allege his capacity, for his own title or conveyance was alone stipulated for. As to his readiness, or his actual tender of the conveyance, the conduct of the defendant rendered an allegation or proof of these useless; for the defendant declared his unwillingness that the contract should be carried into effect, so that any further step on the part of the plaintiff was vain and useless: *Lex neminem cogit ad vana.*

It appears to us, that the district court erred in making a deduction of twenty thousand dollars, a sum greater than that which it is proven would be required to repair the boat entirely, by substituting a new piece of timber to every decayed one. The boat was not sold as a new and perfectly sound one. According to the testimony, the vendees could not expect to find her without some decayed timbers. If the principle, that a sound price implies a sound ware was to be understood, as the district court appears to understand it, no vessel could be sold for a sound price after her first voyage; for the witnesses depose that every vessel has some decayed timbers after her first voyage.

The contract shows that the vendees were willing to give sixty-five thousand dollars for a boat which they must have known to have decayed timber in her. They stipulated that she should be delivered in good order, and this, on a close examination of the evidence and the best judgment we can form, means only in such a condition as to be fit to be employed immediately and during a reasonable time, without any repairs, and in this condition was the *Vesuvius* tendered by the plaintiff.

He is clearly, in our opinion, entitled to recover the price stipulated for, and we deem ourselves bound to say, he is entitled to recover it from the defendant, not as chairman, as one of the directors, nor as agent of the company, but as a stockholder, a member of it. In unincorporated companies, like in all other partnerships, according to the law of the place where the contract was entered into and the domicile of the defendant, the members are jointly and severally liable, either of them may be coerced for the whole debt, an evil consequence which an act of incorporation can alone prevent, though it cannot remove it.

It is therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and this court proceeding to pronounce such a judgment, as in their opinion ought to have been given in the district court, do order, adjudge, and decree, that the plaintiff do recover from the defendant the sum of sixty-five thousand dollars, to be discharged by the payment of fifteen thousand dollars with interest at the rate of five per cent. a year from the inception of this suit, and the delivery of the notes of the *Natchez* steamboat company for the sum of fifty thousand dollars, in four installments at three, six, nine, and twelve months, from the nineteenth of February last. But no execution shall issue

till the plaintiff shall deliver to the vendees, or lodge for them in the office of the clerk of the district court a conveyance of the steamboat Vesuvius, according to the terms of his contract, and it is ordered that the defendant pay costs in both courts

PROOF BY SUBSCRIBING WITNESS.—In the above case the testimony of the subscribing witness was not exacted because he was not a resident of the state. The courts of this state nevertheless adhered to the common law rule, that no evidence of the execution of an instrument would be received until the subscribing witness was produced or his absence accounted for: *Labarthe v. Gerbeau*, 1 Mart. N. S. 486; *Dismukes v. Musgrove*, 8 Id. 379. If, however, the instrument was executed out of the state, the subscribing witnesses were presumed to be non-residents, proofs were received without any other showing that the witnesses could not be procured: *Barfield v. Hewlett*, 4 Lou. 118. And if every diligence was exhausted in a vain attempt to find a subscribing witness, other evidence was received although there was no proof that he was dead or absent from the state: *Thompson v. Wilson*, 13 Lou. 142.

LEX LOCI.—Contracts must be construed and their validity determined by the laws of the place where they were made: *King v. Harman's Heirs*, 6 La. 607; *Morris v. Eves*, 11 Mart. 730; *Evans v. Gray*, 12 Id. 475; *Brown v. Richardson*, 1 Id. N. S. 202; *Greenwood v. Curtis*, 4 Am. Dec. 145, unless they were entered into with a view to their performance elsewhere: *Wardler v. Arell*, 1 Am. Dec. 488; *Smith v. Smith*, 3 Id. 410; *De Sobry v. De Laister*, 3 Id. 535.

LIABILITY OF MEMBER OF UNINCORPORATED COMPANY.—An unincorporated company is a mere partnership and each member is liable for the whole amount of the debts of the company in the same manner that each partner is responsible for the entire liability of the firm: *Angell & Ames on Corp.* sec. 591; *English v. Wall*, 12 Rob. La. 132; *Gorman v. Russell*, 14 Cal. 531; *Tappan v. Bailey*, 4 Met. 529; *Taft v. Ward*, 106 Mass. 513; *Taft v. Ward*, 11 Id. 522. This rule prevails whether the parties intended to bind themselves as partners or not. An application of the rule has occasionally become necessary against persons acting as a corporation when not authorized to do so, either because they were not incorporated, or were acting beyond the state where the corporation could do business or after its charter had expired or been forfeited. Persons assuming to act for a non-existing corporation are personally responsible: *Field on Corporations*, sec. 178; *Herod v. Rodman*, 16 Ind. 241. This rule is indispensable to avoid a complete failure of justice. The supposed corporators or stockholders having obtained the benefit of a contract when there is no corporation to be bound, it must follow either that they shall be held liable or that the other contracting party have no remedy whatever. Those who act as directors, there being no corporation, are liable personally: *Field on Corporations*, sec. 179; *Williams v. Bank of Michigan*, 7 Wend. 542; *Maudslay v. Le Blanc*, 2 C. & P. 409; *Hill v. Beach*, 1 Bea. Ch. 31. An attempt to form a corporation, so defectively executed as not to create even a corporation *de facto*, results in a partnership, if the parties proceed to carry on business: *Wells v. Gates*, 18 Barb. 554; *Fuller v. Rowe*, 57 N. Y. 26; *Whipple v. Parker*, 29 Mich. 370, 380. A like result follows when a corporation continues business after dissolution: *National Bank v. Landon*, 45 N. Y. 410.

PHILLIPS v. JOHNSON.

[7 MARTIN, 226.]

PAYMENT MADE UNDER A DECREE directing money to be paid to certain persons, as heirs of a decedent, will protect the person paying it, notwithstanding an appeal is subsequently taken, and the judgment reversed.

APPEAL. The opinion states the case.

By Court, MARTIN, J. A. Phillips, the plaintiff's brother, died intestate, leaving a large estate, real and personal, to which a curator was appointed, who brought suit against the defendants, as purchasers of a part of the real property of the estate.

During the late war, the present plaintiff, being an alier enemy, was prevented from instituting any action to obtain the estate.

In 1816, one James Rogers, for himself and others, as his co-heirs, applied to the court of probate to be recognized as heirs of the deceased, and they were accordingly admitted by a decree of that court, of the sixth of May of that year, on which day, the present defendants paid him the amount of the judgment obtained against them by the curator. On the next day Rogers entered satisfaction of the judgment, on the re-record; and the curator appealed from the decree of the court of probates, which recognized Rogers and others as heirs of the estate.

In June following, Phillips, the present plaintiff, intervened in the appeal, and the district court reversed the decree of the court of probates, and decreed Phillips, the then appellant, to be heir of the personal estate, and Rogers and others, the then appellees, to be heirs of the real. Ten days after, no appeal from this decision of the district court having as yet been taken, Rogers, for himself and his co-heirs, whose powers he had, acknowledged the payment of the judgment, obtained by the curator, against the present defendants.

In September, 1816, the present plaintiff appealed from the judgment of the district court to this; and in October, 1818, obtained a judgment reversing that of the district court, recognizing Rogers and others as heirs of the real estate of the deceased, and declaring him to be heir of the whole estate, real and personal: 5 Martin, 700.

He then brought the present suit to recover the amount of the judgment, obtained by the curator, against the then and

present defendants, for the amount of part of the real estate purchased by them. There was judgment against him, and he appealed.

We are of opinion that the judgment is correct. The defendants, having paid the amount of the real property to persons declared heirs by a competent tribunal, from whose judgment no appeal had been taken, after the time had elapsed within which a suspensive appeal could have been taken, cannot be said to have made payment wrongfully, while the persons to whom they paid might have compelled payment by legal means.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

REVERSAL OF JUDGMENT.—The consequences of the reversal of a judgment may be considered with reference: 1. To the rights of the parties litigant; 2. To the rights of third persons. With reference to the parties, a reversed judgment is as if it had never been rendered: *Freeman on Judgments*, sec. 481. But where, notwithstanding the right of appeal, the law permits the enforcement of the judgment, the result would be unfortunate, and even iniquitous, if strangers, who, acting upon their faith in the judgment, had parted with valuable consideration in payment of property purchased under it, or otherwise, were liable to be prejudiced by a subsequent reversal. Hence sales, under a judgment or decree, not made to either litigant or his attorney, are not subject to be defeated by a subsequent reversal: *Freeman on Judg.*, sec. 484; *Williams v. Gallien*, 1 Rob. La. 94; *Bailio v. Wilson*, 5 Mart. N. S. 214.

HALL v. SPRIGG.

[7 MARTIN, 243.]

PURCHASE WITH FUNDS OF ANOTHER.—If an agent purchases property in his own name with the funds of his principal, he holds in trust for the latter, and may be compelled to convey.

PAROL EVIDENCE is admissible to prove that a purchase was made with the funds of the principal, although the conveyance was taken in the name of the agent.

APPEAL. The opinion states the case.

By Court, DERBIGNY, J. The plaintiff and appellant complains that the appellee retains for himself, and pretends to keep possession of a tract of land, which he had purchased for the appellant, and the price of which he paid with the appellant's money. The jury found the facts to be as represented by the plaintiff; and judgment having nevertheless been rendered against him, he appealed.

The principles in matter of agency are generally so certain, and the duties of the agent so well understood, that we do not deem it necessary to enter into much demonstration on so plain a subject. *Sic ut liberum est mandatum non suscipere, illa susceptum consummari oportet.* The obligation once contracted must be complied with. If the proxy who bought a thing for his principal caused the contract of sale to be made in his own name, instead of the name of his constituent, there remains something to be done on his part to fulfill his obligation, and that is to transfer the purchase to the person for whom he bought. To pretend that by causing the instrument of sale to be executed in his name, he must be considered as the owner, because it so appears on the face of the instrument, is to misunderstand the rule by which parol evidence is made inadmissible against or beyond the contents of a written act. No such thing is attempted here as contradicting the contents of the act; the plaintiff admits the whole of it, but he says that no such act ought to have been executed to the defendant in his own name, because he purchased as agent; and he says that after having caused the instrument to be so made, he is bound to transfer the property to his principal.

The defendant is equally mistaken when he thinks that the plaintiff can demand nothing more of him than a compensation in damages. Such indemnity is due by the agent in cases of nonfeasance or misfeasance through neglect; but when the obligation of the agent has been fulfilled in part, and it is in his power to fulfill it altogether, the principal has a right to require the contract to be carried into effect to the end.

The plaintiff, in the course of the trial below, had prayed leave to discontinue, and entered a bill of exceptions against the refusal of the judge to grant his request. But being of opinion that he must succeed as the case now stands, we deemed it useless to investigate that question.

It is adjudged and decreed that the judgment of the district court be reversed; and this court proceeding to give such judgment as ought to have been rendered below, do order and decree that the plaintiff and appellant do recover from the appellee the tract of land in controversy, and that the appellee do transfer and convey the same to him; and it is further ordered that the appellee do pay costs.

See *Foote v. Colvin*, 3 Am. Dec. 478; *Wallace v. Duffield*, 7 Id. 660; *Jackson v. Morse*, 8 Id. 306; Wharton on Agency, sec. 240.

THURET v. JENKINS.

[7 MARTIN, 318.]

SALE OF VESSEL AT SEA—CONFLICT OF LAWS.—The sale of a vessel then at sea, valid by the law where the sale was made and where the vendor and vendee reside, is valid here although the law of this state controlling transfers was not complied with.

DELIVERY OF POSSESSION of chattels upon a sale is necessary as against the creditors of the vendor, unless the property at the time of the transfer is abroad and incapable of delivery, in which case the vendee may take possession within a reasonable time after the property comes within his reach.

APPEAL. Plaintiffs attached the undivided one half of the ship *Favorite*. P. Havens intervened claiming under a bill of sale from the defendants. The intervenor's bill of sale was dated June 17, 1819. The attachment was levied July 14, 1819. The defendants being then insolvent, executed the bill of sale in payment of a debt due from them to the intervenor.

Livermore, for plaintiffs. The assignment was made by an insolvent to prefer a creditor, and has not been perfected by delivery. A sale without a delivery does not transfer title: *Durnford v. Brooks*, 3 Mart. 222; *Norris v. Mumford*, 4 Id. 20; *Ramsey v. Stevenson*, 5 Id. 23 [*ante*, 468]; *Fisk v. Chandler*, 7 Id. 24.

Morse, for the intervenor. There is a difference in principle between the cases cited and the one now under consideration. In these cases the property was in Louisiana at the time of the transfer. The contract must be governed by the law where it was made. A debtor has the right to prefer a creditor: *Wilkes v. Ferris*, 5 Johns. 335 [4 Am. Dec. 364]; *Small v. Oudley*, 2 P. Wms. 427. When a ship atsea is sold no delivery is necessary: *Atkinson v. Malung*, 2 T. R. 462; *Portland Bank v. Stacey*, 4 Mass. 661 [3 Am. Dec. 253].

By Court, MARTIN, J. This case differs from that of *Norris v. Mumford*, in a very material point. There, the cotton, the subject of the sale, was in New Orleans; and we held that as the sale of it, if made in this city, would not divest the vendor from his property, with regard to his creditors, it could not, though made in New York, affect the rights of the latter. As to them, the cotton remained the property of the vendor, their debtor, till after a delivery to the vendee. A contrary decision would have given effect in our own state to the laws of another, to the injury of our own people. If A. and B. be partners in

New Orleans, and C. purchases from A. a quantity of cotton in the warehouse of the firm, will his right thereto, if he take instant possession of it, be affected by a sale made a few days before by B. in Natchez or Mobile? Will not C. be listened to, in his own state, when he shows that by the *lex fori* that *loci contractus* that of the domicile of his vendors and his own, the sale and delivery vested the property?

In the present case the ship, the subject of the sale, was at sea, was a New York ship, and the vendors and vendee resident in New York. If, therefore, according to the *lex loci contractus*, that of the domicile of both parties, the sale transfers the property without a delivery, it did so *eo instanti*, or not at all. In transferring it, it did not work any injury to the rights of the people of another country, it did not transfer the property of a thing within the jurisdiction of another government. If two persons, in any country, choose to bargain as to the property which one of them has in a chattel, not within the jurisdiction of the place, they cannot expect that the rights of persons, in the country in which the chattel is, will there be permitted to be affected by their contract. But if the chattel be at sea, or in any other place, if any there be in which the law of no particular country prevails, the bargain will have its full effect *eo instanti* as to the whole world; and the circumstance of the chattel being afterwards brought into a country according to the laws of which the sale would be invalid, would not affect it.

The laws of another country, even of a sister state, are foreign laws, and foreign laws ought to be proven as facts. This court has so very often indulged parties, in establishing any particular part of the common law of England as it prevails, it is believed, in every one of these states but this, by the production of books of reports and elementary works, that it would work great injustice if we rigidly refused to listen to the counsel in this respect, because the part of the common law invoked makes no part of the statement of facts. Neither of the counsel require it, and both are willing we should pronounce on the evidence of that law which they have presented.

There is not the least room to doubt that the interest of the vendors in the ship passed to the vendee, under the principles of the common law of England, as they are understood by the supreme court of the state of Massachusetts, and the circuit court of the United States for that district. In a case perfectly similar in every respect to that under our consideration, the su-

preme court of Massachusetts determined that the *bona fide* conveyance of a vessel and cargo, by deed, to secure the payment of money, the vessel being abroad at the time of the sale, is valid against creditors; provided the vendee takes possession of her without delay, upon her return; and there is no difference between the grand bill of sale, used in England for the conveyance of vessels, and the bills of sale used in this country: *Portland Bank v. Stacey et al.*, 4 Mass. 661 [3 Am. Dec. 253]. But the plaintiff's counsel contends that the above case is in direct opposition to the decisions of this court. Is it strange that the judgments of two courts, deciding according to different systems of laws, should be dissimilar?

Further, it is urged that the decisions of the supreme court of Massachusetts are evidence of the laws of that state, but not of those of New York. It is admitted that the common law of England prevails in both those states.

The supreme court of the state of New York holds that a regular bill of sale is not absolutely necessary to transfer the property of a vessel, that it passes by delivery like another chattel: *Wendover et al. v. Hogeboom et al.*, 7 Johns. 308.

Judge Story, in *Meeker et al. v. Wilson*, says that, by the common law of England, a grant or assignment of goods and chattels is valid between the parties without actual delivery, and the property passes immediately upon the execution of the deed, but, as to creditors, the title is not considered as perfect unless possession accompanies the deed: 1 Gallison, 323. This is the principle which has regulated this court in the decisions cited at the bar. But the learned judge continues: an exception to the rule is where the possession of the grantor is consistent with the deed, or where the property conveyed is, at the time of the conveyance, abroad and incapable of delivery. In the latter case the title is complete, provided the grantee takes possession in a reasonable time after the property comes within his reach.

The laws of Louisiana do not, it is true, recognize the last exception. Property does not pass here by contracts, but by delivery *traditionibus non pactis*. If the ship had been within the state at the time of the sale, the rule in *Norris v. Mumford* would have regulated the decision of this court, but as at that time she was not within the state, the sale ought not to be tested by our laws. It must be by those *loci contractus* against which those of no other country ought to prevail.

Further, there seems to be great weight in the position that

no delivery can take place of an undivided part of a chattel, not susceptible of division. The case cannot be distinguished from that in Massachusetts; and from the evidence adduced to us, from which we are to determine what is the rule of the common law of England, we conclude that the district court did not err in sustaining the claim.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

See *Ramsey v. Stevenson*, ante, 468, and note.

VESSELS AT SEA.—In the year 1871, the New York court of appeals, in the case of *Kelly v. Crapo*, 45 N. Y. 86, was required to consider the effect of an assignment resulting from proceedings prosecuted under the insolvent laws of Massachusetts, where the property claimed under the assignment was the ship *Arctic*, a vessel belonging to the insolvent, a resident of Massachusetts, but which was on the high seas when the assignment was made, and was afterwards attached in New York by the creditors of the assignor. The court of appeals decided that a title acquired under foreign bankruptcy or insolvent proceedings, could not prevail "against the rights of the creditors under the laws of the state where the property is actually situated," and that while the owner of the vessel could have transferred the title by his voluntary act, yet that the transfer made by operation of the insolvency statutes of Massachusetts could not operate over property which was beyond the jurisdiction of that state, and therefore beyond the control of its laws. From this decision a writ of error was prosecuted to the supreme court of the United States. In this court of last resort the principle was successfully invoked that a vessel on the high seas is a part of the territory of that sovereignty to which it belongs, and, therefore, that the vessel in this case was in contemplation of law within the state of Massachusetts, where the proceedings in insolvency were prosecuted. Mr. Justice Hunt, speaking for the court, said: "We are of the opinion, for the purpose we are considering, that the ship *Arctic* was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that state passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that state when the assignment was executed.

"The rule is thus laid down by Mr. Wheaton in his treatise on international law: 'Both the public and private vessels of every nation on the high seas, and out of the territorial limits of any other state, are subject to the jurisdiction of the state to which they belong. Vattel says that the domain of a nation extends to all its just possessions, and by its possessions we are not to understand its territory only, but all the rights it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea.' As an illustration of the proposition that the ship is a portion of the territory of the state, the author proceeds: 'Every state has an incontestable right to the service of all its members in the national defense, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any state may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects.'

"Chancellor Kent, in his Commentaries, says: 'The high seas are free and open to all the world, and the laws of every state or nation have there a full and perfect operation upon the persons and property of the citizens or subjects of such a state or nation. No nation has any right or jurisdiction at sea, except it be over the persons of its subjects, in its own public and private vessels; and so far territorial jurisdiction may be conceded as preserved, for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs.'

"Wharton says: 'A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries. By this,' he says, 'may be explained several cases quoted as establishing the *lex domicilii*, though they are only sustainable on the ground that the ship at sea is part of the territory whose flag she bears. * * * In respect to principle, ships at sea and the property in them must be viewed as part of the country to which they belong.'

"The modern German law is to the same point. Bluntschil, in his *Moderne Völkerrecht*, says: 'Ships are to be regarded as floating sections of the land to which they nationally belong, and whose flag they are entitled to carry.' Bischof, in his *Grundriss des positiven internationalen Seerechts*, says: 'Every state is free on the seas, so that its ships are to be regarded as floating sections of its country, *territoria clausa*; la continuation on la prorogation du territoire, and those on board such ships in foreign waters are under their laws and protection. This even applies to children born to subjects on such ships.'

"Wildman, in his treatise on International Law, says: 'Provinces and colonies, however distant, form a part of the territory of the parent state. So of the ships on the high seas. The rights of sovereignty extend to all persons and things not privileged, that are within the territory.' *Craze v. Kelly*, 16 Wall. 624.

DUNN v. VAIL.

[7 MARTIN, 418.]

FEDERAL OFFICERS may be sued in the state courts for trespasses committed by them under process issued out of a court of the United States.

THE action was against the defendant to recover damages for a wrongfully taking a slave belonging to the wife of the plaintiff, Dunn; and also to obtain an injunction to prevent the sale of the slave. Defendant answered that he was a marshal of the United States, and took the slave under an execution against Dunn, the husband; and he denied the jurisdiction of the state court over him. The plea to the jurisdiction was sustained, there being no trial on the merits. Plaintiffs appealed.

Turner, for plaintiffs: The levy upon property which does belong to defendant was not authorized by the writ, and is a trespass: *Prevost v. Hennen*, 5 Mart. 221; 4 Bac. Abr. 459; *Sel-*

lon's Prac. 556; *Meunier v. Duperron*, 3 Mart. 285. The courts of the United States have no jurisdiction over this case.

Dick, for the defendant. The state cannot interfere with the execution of process from the federal courts. Conflicts of jurisdiction must be avoided: *Diggs v. Keith*, 4 Cranch, 179.

By Court, MARTIN, J. It is clear that the plaintiffs had a right to sue for the alleged trespass, and that neither the defendant's commission as deputy marshal, nor the writ of *fiery facias* alluded to, can afford him any protection if the facts set forth in the petition be true.

We do not mean to say that the injunction obtained in this cause can be so enforced as to prevent or delay the execution of the process of the court of the United States; but if, under color of it, the defendant has committed a trespass on the property of a citizen of his state, he is, in the opinion of this court (Derbigny, J., dissenting), suable in her courts, for he is not suable in those of the United States.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided, and reversed, and this court proceeding to give such a judgment as, in its opinion, ought to have been given in the district court, it is ordered, adjudged, and decreed that the plea in abatement be overruled and set aside, and the cause remanded with directions to the district judge to proceed to the trial of it on the merits, and it is ordered that the defendant and appellee pay the costs of this appeal.

ACTIONS IN STATE COURTS AGAINST OFFICERS OF THE UNITED STATES.—It will be observed that the court, in this case, does not assume any authority to control a United States marshal in the execution of process. The theory of the plaintiff's case was, that the defendant, though an officer of the United States, charged with the execution of a writ from one of its courts, had proceeded to do an act not justified by his official position, nor within the command of his writ. If this theory were borne out by the facts, then the defendant was as clearly a trespasser as if he had seized the property in his private capacity, without any writ. He was therefore suable in the same manner, and in the same courts as a private person. Having acted outside of his writ, it could not protect him from an action brought against him in the state court: *Edwards v. Nicholson*, 13 La. 582; *Baulic's Syndics v. Nicholson*, 2 Id. 220; *Crawford v. Watterson*, 5 Fla. 472; *Hirsch v. Rand*, 39 Cal. 315. In some cases, officers of the United States, when sued in the state courts, have the right of removal to the national courts: *Dillon's Removal of Causes*, p. 6; but even in those cases, the jurisdiction of the state court continues until the application for removal is properly made: *Hirsch v. Rand*, 39 Cal. 315.

DURNFORD v. PATTERSON.

[7 MARTIN, 460.]

DAYS OF GRACE are not allowed on a note payable "on the first day of May next, *fixed*."

NEGLECT OF A BANK, in not demanding payment of a note, so as to charge the indorser, makes it responsible to the payee.

APPEAL. The opinion states the case.

By Court, DERBIGNY, J. On the first day of April, 1819, James Patterson made his promissory note to the order of the defendants, payable on the first day of May following. The expressions are "on the first day of May next, *fixed*, I promise to pay Patterson & Philpot, or order," etc. The plaintiff having put this note in the Louisiana bank for collection, the bank caused a demand to be made of the maker at the expiration of the three days of grace, to wit, on the fourth of May, and on that day had it protested for non-payment. The plaintiff now sues the indorsers; and in case it should be decreed that they are exonerated, he calls upon the Louisiana bank as answerable for the amount on account of neglect.

The question between the plaintiff and the indorsers is, whether a promissory note, payable on a certain day, *fixed*, must be paid on that day exclusive of the days of grace. If it should be so adjudged, the inquiry which will arise between the plaintiff and the Louisiana bank will be, whether, as agents, they have incurred any responsibility on this occasion?

It appears that this mode of making notes payable on a certain day, with the addition of the word *fixed*, is not usual in the United States, for no case has been found where any such thing is mentioned. We should, therefore, look in vain in the law merchant, as it prevails generally through the Union, for any rule on the subject. This is an usage peculiar to our own state, and whatever be the rules by which it must be tested, they must be found at home.

By recurring to the authors who have written on the laws which formerly governed this country, we find that this manner of making promissory notes was well known to them. Febrero, de contrs. ch. 15, sec. 15, no. 11, after mentioning the different bills of exchange which are entitled to the delay of the days of grace, makes this remarkable observation: *Pero si la letra dice, à tantos dias prefixos, ó à tantos dias sin mas termino, no hay cortesía, y así debe pagarse en el de su vencimiento.* But if the bill says at so many days *fixed*, or at so many days without further

term, there are then no days of grace, and the bill must be paid on the day it becomes due. Such an authority on a point on which the law merchant of the United States is silent ought to be conclusive. But the defendants oppose to it the opinion of a foreign jurist, who thinks that the word *fixed* added to the time of payment of a bill or note, has no meaning, and ought to be considered as a surplusage; and as in commercial matters Spanish laws and Spanish usages cannot, as we have already said, be deemed absolutely binding, it is not improper to examine and compare both these contrary opinions, and see which is more consonant with justice. Jousse, in his comment on the French ordinance of 1673, declares it to be his sentiment that in a note payable on such a day, the insertion of the word *fixed* adds nothing to the sense; and does not prevent the allowance of the days of grace; but he acknowledges that if the note was made payable on such a day, exclusive of the days of grace, it would be payable on that day absolutely.

It must be confessed, that in this latter case, there would be but little room for interpretation, and he would be obstinate indeed who would insist on the days of grace, after such a stipulation. But, although the word *fixed* is not quite so expressive, is it true that it has no meaning? Among the definitions of the verb *to fix*, one is to direct without variation, another to establish invariably; take either; the idea of invariability is attached to both. The word is used evidently with a view to make the payment on that day more certain than it otherwise would be. It is a general rule, for the interpretation of contracts, to endeavor to give all the words some meaning, and to reject only those which can have no meaning at all. Another rule to ascertain the sense of a doubtful word is to examine with what intention the parties may have inserted it. *In conventionibus, contrahentium voluntatem potius quam verba spectari placuit.* Can it be supposed that the parties in this case introduced this expression in the note without any intervention, and for no purpose; an expression never used in the common manner of making notes, and which, under the former laws and usages of this country had the effect, as Febrero informs us, to prevent any allowance of the days of grace? It cannot be believed. We therefore think that the word *fixed* was introduced here with the intention of making the note payable on the first of May, absolutely and invariably; that a demand of payment ought to have taken place on that day; and that, for want of such a demand, the indorsers are, according to the laws of commerce, exonerated.

The question now to be decided between the Louisiana bank and the plaintiff, is whether the bank has incurred any responsibility as agent from neglect or unskillfulness in the management of this business? The principles in the matter of agency are generally well understood. If he who undertakes the business of another is capable of managing it, and neglects to do so with due care, he is answerable. If he is not capable, he is still answerable, for he ought not to have engaged to do that which he could not perform; *a procuratore dolum et omnem culpam, non etiam improvisum casum proestandum esse, juris auctoritate manifeste declaratur*: C. L. 13, mand. In this instance, the bank either knew, as the defendants offered to prove, that such a note was payable exclusive of the days of grace, and not demanding payment on that day was a neglect; or they were ignorant of it, and then they undertook to perform a thing for the execution of which they had not sufficient information. In either case they have incurred responsibility. The observations made by their counsel as to the nature of their agency, which was gratuitous, are of no force. The principles above laid down govern as well in cases of gratuitous agencies, as in others. The truth is, that they are derived from the Roman law, to which no such thing was known as agency for a salary.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be reversed, and proceeding to give such judgment as we think ought to have been rendered below, we do further adjudge and decree that judgment be entered for the defendants, Patterson & Philpot, and that the plaintiff do recover against the Louisiana bank the amount of the note here sued for, to wit, nine hundred and sixty-four dollars and ninety-three cents, with costs.

BANK, LIABILITY OF, AS A COLLECTION AGENT.—The judgment of the court in holding the bank responsible for any injury resulting to the holder of the note from its failure to make a proper demand for payment is well sustained by the authorities: Daniel on Neg. Insts. sec. 327.

ORLEANS NAVIGATION CO. v. SCHR. AMELIA.

[7 MARTIN, 590.]

SUITS AGAINST THE UNITED STATES cannot be sustained in the courts of this state.

VESSELS of the United States can not be seized to compel the payment of toll.

APPEAL from the district court. The opinion states the case.

Ellery, for the plaintiffs.

Ripley, *contra*.

By Court, MARTIN, J. The plaintiffs have seized, and pray for the sale of, a vessel of the United States, to obtain payment of three hundred and odd dollars, which they claim for toll, which accrued on her passage up and down the canal Carondelet. The attorney of the United States claims a restoration of her on this, among other grounds, that the United States are not suable in *personam* nor in *rem*. The court of the first district has given judgment for the plaintiffs, and the United States have appealed.

That the plaintiffs have a right to a compensation, if the United States have made use of a canal dug and kept in repair, at the exclusive expense of the former, can, perhaps, no more be doubted than that the sailors employed in the vessel are entitled to a compensation for their services. If she was the property of any other person, natural or politic, but the sovereign, the *Amelia* could be seized and sold, or her owner sued, for the payment of the claims of her sailors or those of the company through whose canal she has passed. Yet the sailors of a vessel of the United States cannot obtain their wages by a suit in *personam* or in *rem*, in the ordinary courts of justice. The reason is, that these tribunals are established to coerce private persons, whether citizens or aliens, but not to decide on demands against the sovereign, who has appointed other officers to adjust and discharge claims against him. If, therefore, the plaintiffs have any demand against the United States, they mistook their remedy.

After the seizure, the officers of the United States might come into court to demand the restoration of public property illegally seized, without thereby giving jurisdiction of the claim against the United States. This view of the subject renders an examination of the other points useless.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the schooner *Amelia* be restored to the officers of the United States, and that the plaintiffs pay costs in both courts.

SUITS AGAINST THE SOVEREIGN.—“The king cannot be made defendant in an action. Redress must be sought for, if it is obtainable at all, by a petition of right.” Dacey on Parties, p. 5. “It is a familiar doctrine of the

common law that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of congress. The same exemption from judicial process extends to the property of the United States, and for the same reasons. There is no distinction between suits against the government directly and suits against its property." *The Siren*, 7 Wall. 153; *United States v. Clark*, 8 Pet. 443; *United States v. Ringgold*, Id. 150. While the government cannot be sued without its consent, yet it is liable for injuries done by it, its servants and property to the property of private persons. The remedy for the enforcement of this liability must be pursued in such manner as the sovereign power is willing to provide. Where, however, the United States institutes an action it is held by the supreme court that "they waive their exemption so far as to allow a presentation by the defendant of set-offs legal and equitable, to the extent of the demand made or property claimed; and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them beyond the demand or property in controversy." *The Siren*, 7 Wall. 154; *United States v. Macdaniel*, 7 Pet. 16; *United States v. Ringgold*, 8 Pet. 150. Each of the states is a sovereign power in the sense and to the extent that it cannot be sued except in those cases in which it has consented to waive this attribute of sovereignty. The preponderance of authority in the state courts seems to be in favor of the doctrine that set-offs are not admissible in actions by the state, and that the privilege of sovereignty is not waived by bringing the action: *Commonwealth v. Matlock*, 4 Dall. 303; *State v. Leckie*, 14 La. An. 636; *Treasurer v. Clearie*, 3 Rich. (S. C.) 372; *Borden v. Houston*, 2 Tex. 594; *Bates v. Republic*, Id. 616; *Chevalier v. State*, 10 Id. 315; *Commonwealth v. Rodes*, 5 T. B. Mon. 318; *State v. Baltimore etc. R. R. Co.*, 34 Md. 344. See also *New Orleans v. Finnerty*, 27 La. An. 68, and note to *Gregg v. James*, ante, 153. The right to sue a state in its own courts clearly cannot be maintained except where granted by the act of its own legislature. But by the constitution of the United States each state has submitted itself to a limited extent to the jurisdiction of the national courts. Section 2 of article III. of that constitution extends the judicial power of the United States "to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states and between a state, or the citizens thereof and foreign states, citizens or subjects." The second subdivision of the same section declares that in all cases "in which a state shall be a party, the supreme court shall have original jurisdiction." The operation of this section has been restricted by an amendment now constituting article XI. of the constitution, and which prohibits the exercise of the judicial power of the United States

in "any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

SIDES v. McCULLOUGH.

[7 MARTIN, 654.]

FRAUD, WHO MAY URGE.—A deed made to defraud a third person is valid between the parties, and cannot be assailed by one who was not injured by it, and who has not succeeded to the rights of any person who was so injured.

APPEAL. The opinion states the case.

Turner, for the plaintiff.

Maybin, contra.

By Court, **MATHEWS, J.** This is a petitory action commenced to recover a tract of land described in the petition; both parties claim under James Jackson, and the *locus in quo* is not disputed. The plaintiff and appellant obtained a verdict and judgment, and the defendant appealed.

There is an agreement of counsel that the record contains all the evidence given in the district court, and in it is found a bill of exceptions taken to the opinion of the judge in rejecting certain documents and witnesses offered by the defendant to prove fraud in one of the plaintiff's title papers. The evidence thus offered and rejected is an affidavit of the grantee of the land, and the testimony of a witness establishing that no consideration was paid by D. Jackson, under whom the plaintiff immediately claims, as expressed in the deed of sale executed to him by James Jackson, his father, and that the sale was made to defraud one of his sons from part of his property.

Without inquiry into the competency of a vendor in any case, as a vendor, to defeat his own act of sale, it is sufficient, in the present, to observe that the district court was correct in rejecting the affidavit of Jackson, sen., on the ground of its being *ex parte* evidence.

Neither do we believe that the court erred in the rejection of the witness. It is agreed, that on suggestion of fraud, testimonial proof may be received against an instrument; but this can only be regularly done in cases in which one of the parties to a suit may be subject to injury by such fraud, in rights and claims which existed at the time of its perpetration. In the case now

under consideration, the defendant claims no right derived from the person who was intended to be injured by the alleged fraud and falsehood in the deed and sale from Jackson to his son. As to him, everything is fair in his second purchase from the grantor, with legal notice; the first act of sale having been recorded in the office of the parish judge nearly two years previous to his purchase; and he does not in any manner represent the person against whom the alleged fraud is supposed to have been intended.

During the hearing in this court an objection was made to the admissibility of the deed from J. Jackson to D. Jackson as being an act *sous seing prive*, and not authenticated by testimony; a copy of the deed comes up with the record as a part of the evidence received in the court *a quo*, and we must presume it to have been correctly admitted, as no bill of exception suggests the contrary.

On examination of the whole case, as it is presented to us, we are of an opinion that the plaintiff ought to have judgment; and having obtained it in the district court we would have no hesitation in affirming it, if it had contained the reasons on which it is grounded, as the constitution and law require.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and proceeding to give such a judgment as, in our opinion, in the district court ought to have been given, it is further ordered, adjudged and decreed that the plaintiff and appellee do recover from the defendant and appellant, for the reasons above stated, one hundred acres of land claimed in the petition with costs, and that the plaintiff and appellee pay costs in this court.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

GERAULT v. ANDERSON.

[WALKER, 30.]

JUDGMENT AGAINST A DECEDENT.—A judgment entered against a defendant after his death is void.

JUDGMENT ENTERED IN ANOTHER STATE.—An action on a judgment entered in another state may be defeated by showing that the court where the judgment was given lost jurisdiction by the death of the defendant *pendente lite*.

WRIT of error. The opinion states the case.

By COURT. This is a writ of error brought to reverse the judgment of the Adams superior court. It appears that the defendant, Anderson, brought his action on a decree of the superior court in chancery, against the plaintiff in error as administratrix of John Gerault. Anderson, in the state of Kentucky, instituted against Gerault, in his life-time, a suit in chancery in the Livingston superior court, to compel a conveyance of a tract of five hundred acres of land sold by Gerault, agent, to said Anderson. That Gerault afterwards sold the same to Kirkman; that during the life-time of Gerault the court of appeals decreed that Gerault should pay to Anderson the value of the land, to be ascertained and assessed by the court below; that after the interlocutory decree, and before the court below had carried it into effect by assessing the damages, Gerault died. That the court below, it is presumed without the knowledge of the death of Gerault, executed the interlocutory decree by assessing the damages, and passed the final decree against Gerault, who at that time had been dead several months. The plaintiff in error to the action below pleaded in abatement that

before the execution of the interlocutory decree by the superior court of Livingston county, Kentucky, the intestate departed this life, and prayed judgment, to which plea the plaintiff, Anderson, demurred, and there was a joinder in demurrer; the court sustained the demurrer, and a *respondeat ouster* was awarded, and the plea of *nul tiel record* was pleaded, and judgment for plaintiff. Upon this judgment the present writ of error is founded.

Two errors are assigned: 1. That the plea in abatement was sufficient in law to abate the action below; 2. That the plea in bar was sufficient to have barred the plaintiff's action, and the general error; that judgment below ought to have been given for defendant, instead of the plaintiff. The defendant below relies on the single point, the conclusiveness of the decree upon which the judgment is founded. I confess this case involves principles of great consequence, and is attended with much difficulty. The opinion of the court must be formed more upon general principles of law than the authority of adjudged cases. It is with great diffidence the court proceeds upon unexplored ground, but their duty compels them to advance, confiding in the conscious rectitude of their intentions. The principal error relied on by the plaintiff is the first assigned. It is contended that the plaintiff is no party to the decree in Kentucky; that she could not, in her capacity of administratrix, sustain a bill of review to reverse the decree, and that being no party, she is entitled, under the rules of law, to avail herself of it by plea; and secondly, that at the time of assessing the damages under the interlocutory decree, and at the final decree, the court of Kentucky ceased to have jurisdiction over the person of her intestate. That the plaintiff, in her capacity of administratrix, could not maintain a writ of error is established by the decisions of the federal courts, the courts of Massachusetts, and by the old supreme court. The decision of Connecticut is different, as reported by Kirby: 1. That a stranger to a judgment may avail himself of every objection by plea is equally clear: 2 Mod. 308; Cro. Eliz. 199; Doug. 27, 58, 76, 125; 2 Bac. Ab. 189, note; 2. That the death of a party, between interlocutory and final judgment, was error at common law, and the law was changed by the statute of 8 and 9 William III., ch. 2, sec. 6; and the death of the party, between verdict and judgment, was also error at common law, under the statute of 17 Charles II., ch. 8; that the death of Gerault abated the suit according to the rules of practice in

chancery, and that a revivor ought to have been had against his representatives, there can be no doubt. But waiving these points, the court will rest their decision upon the question, whether the court of Kentucky, after the death of Gerault, had jurisdiction over the case, so as to enable it to pass a decree to bind his representatives, who were no parties to it, and not citizens of Kentucky. This involves the much litigated question as to the conclusiveness of judgments under the constitution of the United States, and the act of congress. This court not having given an opinion, to my knowledge, upon this question, it is open.

By the first section of the fourth article of the constitution of the United States, it is declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the congress may, by general laws, prescribe the manner in which acts, records, and proceedings shall be proved, and the effect thereof. By virtue of that power, congress, by the act of May 26, 1790, after prescribing the mode of authentication, "declares that the said records and judicial proceedings shall have the same faith and credit given to them in every court within the United States as they have by law and usage in the courts in the state from whence the said records are or shall be taken." What is the construction of this act of congress? What is to be the effect of a judgment of one state when produced as evidence in another? Whether it is to be received as conclusive evidence of a debt, or be regarded in the same light as foreign judgments are by the English courts, are questions upon which the most enlightened and distinguished judges in the United States have differed in opinion. In the circuit court of the United States for the district of Pennsylvania, on a judgment obtained in New Jersey, the plea of *nil debet* was held bad, on the ground that such a plea could not be received in the courts of New Jersey. Judge Wilson was of opinion that the act of congress had declared the effect, and that as no such plea could be received in New Jersey, none such could be received here: 2 Dall. 302. In Massachusetts, in an action of debt, brought on a judgment obtained in New Hampshire on a promissory note, the defendant pleaded infancy, and that also during all the time from the making of the note, and the recovery of the judgment, he was an inhabitant and resident of Massachusetts. The plaintiff demurred to defendant's plea and judgment was given against the demurrer: *Bartlet v. Knight*, 1 Mass. 401 [2

Am. Dec. 36, and note]. In a late case in the same court, in an action on a judgment in New Hampshire, in which process had been personally served, a majority of the court held that the defendant should not be allowed to impeach the judgment. Parsons, chief justice, says, judgments rendered in any other courts in the United States are not, when produced here as the foundation of the action, to be considered as foreign judgments, on which the merits are to be inquired into as well as the jurisdiction of the court rendering them, neither are they to be considered as domestic judgments rendered in our courts of record, because the jurisdiction of the courts rendering the judgment is a subject of inquiry; but such judgments, as far as the court had jurisdiction, are to have in our courts full faith and credit. They may, therefore, be declared on as evidence of debt or promises, and on the general issue, the jurisdiction of the court rendering them is put in issue: *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]. In New York, three judges against two held that in an action brought on a judgment from another state, the judgment was to be regarded as a foreign judgment, and that the constitution and the act of congress merely required that credit be given to its contents, but that the effect and operation of it was left as at common law: Cai. 460. And this is now the received and established law in New York. The merits of the decree not being involved, it is not necessary to decide whether the decision in New York, the circuit court of the United States, or Massachusetts be correct. Those enlightened courts agree that the jurisdiction of the courts can be inquired into in an action brought on a judgment, though they differ as to the power to inquire into the merits. It is an established principle that a judgment obtained without service of personal process on defendant is not even *prima facie* evidence of debt on such a judgment. No assumpsit can be implied: 9 East, 192; Kirby, 119; 8 Mass. 273; *Buttrick v. Allen*, 5 Am. Dec. 105. And in New York it has been determined that no action would lie upon a judgment obtained in another state against a person resident in New York, in an action commenced by the service on the defendant, while in the state of New York, of a rule to show cause, such service being void, both on general principles and by a statute, to preserve the jurisdiction of the state. Although the rule to show cause was in the nature of a *scire facias* to charge defendant *de bonis propriis*, on a previous judgment obtained against him in a representative capacity. What was the nature of the action in

Kentucky? It was an action *in personam*, that the court had jurisdiction over Gerault during his life-time, is admitted, but can it be said that their jurisdiction continued after his death? Did not all his rights and obligations devolve on his representatives? And were not those representatives out of the jurisdiction of the court? To say that the court had jurisdiction over the dead, would contradict every principle of law and rule of proceeding. Why, in chancery, on the death of a party and the transmission of his interests to another, is a bill of review required? Why is a suit said to abate on the death of either party? The answer is, that on the death of the party his interest ceases, and the jurisdiction of the court ceases also.

In courts of justice there must be *actor*, *reus*, and *judex*, before the court can act effectually to bind the parties. In courts of admiralty, in questions of prizes, where the jurisdiction is exclusive and conclusive against all the world, if the subject of its sentence be not within its jurisdictional limits, the jurisdiction can be inquired into by the courts of another country: 4 Cranch, 241; 1 Johns. 471 [*Wheelwright v. Depeyster*, 3 Am. Dec. 345]. Let us inquire into the principles of the decisions in *Bartlet v. Knight*, 1 Mass. [2 Am. Dec. 36]; [*Bissel v. Briggs*, 6 Am. Dec. 88]; *Buchanan v. Rucker*, 9 East, do not proceed on the grounds: 1. That it is contrary to the first principles of justice to condemn one without a hearing; 2. The action being *in personam*, the court could have no jurisdiction, the party not being amenable to, or subject to their laws. Is it not an established principle, that before a person can be subject to, he must be within the jurisdiction of those laws. The case of *Fenton v. Garlic*, 8 Johns. 194, is a case in point. In that case a judgment had been obtained in Vermont against the defendant in his representative capacity, and an attempt was made to subject him *de bonis propriis*, by the service of a notice upon him in the nature of a *scire facias*, and a judgment was entered against him in Vermont. In an action brought in the state of New York, upon that judgment, did not the court decide upon general principles, that the judgment was void, proceeding upon the grounds that he was not amenable to their laws, and is not this in conformity with the decision in Cranch? The proceedings being *in rem.*, the subject-matter not being within the jurisdiction of the court, the judgment was void and did not change the property. Put this case in its most favorable point of view, say in Kentucky, a law of that state authorized the court to give notice to the representatives of Gerault to appear and make them-

selves parties to the suit by reviving it. They had failed so to do and the court had proceeded to enter up the decree. Would this decree be binding upon them? I think not. From the principle to be extracted from the cases before cited, they not being subject to the municipal laws of Kentucky, would not be bound by them, and of consequence, a decree of the court of Kentucky could not affect their rights. In the case of bail, on *scire facias*, and two *nihils* returned, the reason the bail is bound, is because he is subject to the laws of the country, and must take notice of them at his peril. But a person not subject is not bound, and what would be considered a regular proceeding in the first place, would be irregular in the last. The case of *Robinson v. Executors of Ward*, 8 Johns. [5 Am. Dec. 327], and *Fenton v. Garlic*, established this to be the rule; judgments of other courts coming in incidentally, the court holds them conclusively between the parties, but when the court is called upon to aid in the execution of such judgment, they at least have a right to inquire into the jurisdiction of the court giving the judgment, as well as the regularity of the proceedings. The authorities cited by the defendant's counsel from *Ambler*, 762-3; and 2 *Strange*, 733; 4 Johns. 34; establish the principle that judgments coming in incidental are conclusive, but they cannot apply to the present case. If, then, the principles drawn from the authorities be correct, can it be for a moment doubted that the superior court of Livingston county ceased to have jurisdiction over this case upon the death of Gerault, and can it be deviating from the respect due to that honorable court, for us to do what that court itself would have done had they been possessed of the same facts? Fastidious indeed, must that man be who could be offended. The court feel every respect for the judicial decisions of sister states, and never would willingly intrench upon them. The opinion of this court does not extinguish the remedy of the defendant, as has been contended, and the progress of this cause in Kentucky, when it was discovered that the court of Livingston had not jurisdiction over it, points out the course. The same may now be adopted. The court is therefore of opinion, that the court below erred in overruling the first plea of the plaintiff in error, and the defendant below, and that the judgment of the said superior court be reversed.

A JUDGMENT AGAINST A DECEASED PERSON is considered void in the subsequent cases in Mississippi of *Lee v. Gardiner*, 26 Miss. 521, and *Parker v.*

Horne, 38 Id. 215. Freeman in his work on Judgments, sec. 153, lays it down: "That a judgment against a person dead at its rendition is valid until reversed or set aside by some competent judicial authority, and that it cannot be collaterally attacked is established by a larger preponderance of the authorities than can be brought forward to shield a judgment against a married woman from collateral attack and overthrow. But there are, nevertheless, quite a number of cases in which judgments rendered for or against a person then deceased, but over whom in his life-time the court had jurisdiction, have been declared void."

UPON THE EFFECT OF JUDGMENTS OF OTHER STATES, see the note to *Bartlet v. Knight*, 2 Am. Dec. 36, 42.

DUGGEN v. McGRUDER.

[WALKER, 112.]

A CERTIORARI, where the prosecution is at the instance of the king, is awarded as a matter of right; but the case is somewhat different where the prosecution, though in the name of the king, is for the benefit of a private person, in such a case, though the suit issues as a matter of course, a *procedendo* will be awarded, if good cause be shown.

CERTIORARI IN CIVIL CASES does not lie pending an appeal, nor while the parties have the right to appeal, unless the proceedings assailed are void for want of jurisdiction.

NEGLECT TO APPEAL.—If persons having a remedy by appeal permit the time to expire, certiorari will not issue for their relief, unless upon a special showing.

CERTIORARI—WHEN A MATTER OF RIGHT.—Certiorari is not a writ of right, and will issue only when it appears that injustice has been done; but whenever rights have been infringed, by persons clothed with authority to act, but who pursue the authority illegally, the person injured may obtain redress by certiorari, unless he can resort to appeal or writ of error.

WRIT of error. The opinion states the case.

By Court, **ELLIS, J.** This case comes up on a bill of exceptions from Jefferson county, and the plaintiff, by his counsel, assigns for error, the following facts:

1. That a certiorari did not lie in cases where another remedy was given by statute; and, 2. That a writ of certiorari was not a writ of right between citizen and citizen, without a showing to the satisfaction of the judge.

From an examination of the record, I find process of summons was issued against Edmund Duggen, dated the seventh of March, 1820, returnable before the justice on the thirteenth of the same month, to answer James T. McGruder, in a plea of debt, etc., of forty-two dollars. And the defendant not making

his appearance in obedience to the summons, judgment by default was rendered against him which was made final. Whereupon the defendant prayed a stay of execution according to the provisions of the statute, in such case made and provided, which was granted; and the defendant and his security failing to comply with the condition of the bond, entered into under the requisitions of the law, judgment was given and execution issued. Whereupon the defendant filed his petition before one of the judges, and procured a writ of certiorari, returnable before the superior court of law in and for the county of Jefferson, and the cause coming on to be heard at the March term of 1821, the counsel of McGruder moved the court to quash the writ of certiorari, because it was issued erroneously, and to award a *procedendo*, upon the ground that a certiorari did not lie in cases where another remedy by appeal was given. And secondly, that this writ could not be considered by the court as a writ of right, emanating as a matter of course, upon the requisition of either party.

"A certiorari is an original writ issuing out of chancery or the king's bench, directed in the king's name to the judges or officers of an inferior court, commanding them to return the record of a cause depending before them, to the end the party may have the more sure and speedy justice before him or such other justices as he shall assign to determine the cause;" 1 Bac. Ab. 559. The court of king's bench has a superintending power over all the inferior courts of criminal jurisdiction, and will in the exercise of its power award a certiorari, and where the prosecution is at the instance of the king, they award the writ as a matter of course, because it is his prerogative to be heard in any of his courts in the kingdom. The case is somewhat different where the prosecution is nominally at the suit of the crown, but really carried on by a private individual.

Here, it is true, upon application the writ would issue as a matter of course, but upon good showing, a *procedendo* must be awarded: 1 Bac. Ab. 559, note, C.; 4 Burr. 2456. In civil cases the judges will not grant this writ where an appeal is given, if the objection be not to the want of jurisdiction, but to the merits, for that is more properly the subject of appeal. A *fortiori* they will not grant it pending an appeal. But if there is a right of appeal given by statute to both parties, limited to take effect in a certain time, and neither of them avail themselves of the privilege of appealing, it does not necessarily shut the door against the exercise of other rights. We are willing to

recognize the doctrine, that during the existence of the right of appeal, no certiorari can issue, and not afterwards, unless upon a special showing. Heretofore it has been the practice in our state, to let these writs run upon the simple suggestion of either party, that there is error in the record of the proceedings below. This was neither warranted by the unquestioned law in England, or the usages of their courts. In this state, we have for several years witnessed with anxious solicitude, the delays inseparable from a practice, we have adhered to, more for the sake of uniformity, than from a conviction of the correctness of the principle recognized. It would be going beyond the limits assigned to a court of appellate jurisdiction, to specify the particular grounds, upon which a showing ought to be made, before the issuing of the writ. This, from the nature of the powers of the judges, must always rest with them, in the exercise of a sound discretion. In the second place, from a careful examination of the books, we have not been able to discover that this writ can be demanded as a matter of right, unaccompanied by such circumstances as would convince the judge injustice had been done. But "whenever the rights of an individual are infringed, by the acts of persons clothed with authority to act, and who exercise that authority illegally, and to the injury of an individual, the person injured may have redress by certiorari," unless he can resort to his writ of error: 16 Johns. 49. This view of the case has been taken in reference to the law as it stood previous to the passage of the late act of assembly, entitled "an act to reduce into one the several acts and parts of acts, concerning the establishment, jurisdiction and powers of the superior courts of law," the one hundred and fifty-third section of which provides, "no proceedings before a justice of the peace for the recovery of any debt or demand, within the jurisdiction of such justice of the peace, shall be removed into any circuit court, by appeal, writ of error, certiorari, or in any other manner whatever."

Without taking into consideration the law of 1822, we are of opinion the judge below erred in deciding that a writ of certiorari is a writ of right, and to be granted on application, without circumstances to show injustice had been done.

Judgment of the court below reversed.

HAMPTON and WINSTON, JJ., concurred.

CERTIORARI, DESCRIPTION OF.—"The writ of certiorari is a writ issuing sometimes out of chancery, and sometimes out of the king's bench or common-

pleas; and lieth where the king would be certified of any record which is in the treasury, or in the common pleas, or in any other court of record; or before the sheriff and coroner; or of a record before the commissioners, or before the escheator; in which cases he may send this writ to any of the said courts or officers, to certify such record before him *in banco*, or in chancery, or before other justices, where the king pleaseth to have the same certified; and he or they to whom the certiorari is directed, ought to send the same record, or the tenor of it, as commanded by the writ; and if they fail so to do, then an *alias* shall be awarded, and afterwards a *pluries*, with a clause of *vel causum nobis signifikes*, and after that an attachment, if good cause be not returned upon the *pluries*." Tidd's Pr. 397.

CERTIORARI NOT A WRIT OF RIGHT.—The proposition asserted in the foregoing decision that certiorari is not, except upon application of the king or the people, a writ of right, is abundantly sustained by the authorities both at common law and under the practice in the United States. It is everywhere styled a discretionary writ. By this we do not understand that the court or judge has the right to grant or refuse the writ capriciously; but that all of the circumstances disclosed to the court are to be taken into consideration, and the writ is to be refused, or, if improvidently granted, is to be quashed, unless substantial justice and equity will be promoted by the exercise of the supervisory authority of the superior tribunal: *Bannister v. Allen*, 1 Blackf. 414; *Erwin v. Erwin*, 3 Dev. 528; *Bath Bridge Co. v. Magoun*, 8 Greenl. 293; *Droune v. Stimpson*, 2 Mass. 445; *Lees v. Childs*, 17 Id. 352; *Huse v. Grimes*, 2 N. H. 210; *Munro v. Baker*, 6 Cow. 396; *People v. Supervisors*, 15 Wend. 198; *Trustees of Schools v. School Directors*, 10 Chicago L. N. 380; *Flourney v. Payne*, 28 Ark. 87; *Farmington R. R. Co. v. County Commissioners*, 112 Mass. 206; *Keys v. Marin Co.*, 42 Cal. 252; *People v. Andrews*, 52 N. Y. 445; *Walbridge v. Walbridge*, 46 Vt. 617; *Knapp v. Heller*, 32 Wis. 467; 18 Albany L. J. 142. The discretion of the court is to be exercised as in other cases, not from outside rumors nor from the representations of parties, made out of court, but from the petition and return and such other matters as under the practice in the particular state are proper and competent for judicial consideration: *Scroggins v. State*, 55 Ga. 380. If the proceedings objected to are merely informal, they will not be set aside if substantial justice has been done. If, however, the action of the board or tribunal sought to be reviewed is wholly void, for want of jurisdiction, it occurs to us that it must be vacated, although the action taken would be equitable and meritorious if proceeding from a tribunal having authority to take it. But in all cases, if it appears that the proceeding complained of is chargeable to the negligence of the complainant, or that he has acquiesced in it for an unreasonable period of time, he cannot obtain relief by certiorari: *Hagar v. Supervisors*, 47 Cal. 222; *Dye v. Noel*, 85 Ill. 290; *People v. City of Brooklyn*, 15 N. Y. S. C. 56; *Trustees of Schools v. School Directors*, 10 Chicago L. N. 380. What delay must be regarded as so unreasonable as to preclude the complainant from resorting to this writ is not very definitely stated, except in California, where a delay of one year is fatal: *Keys v. Marin Co.*, 42 Cal. 253. See *Trustees of Schools v. School Directors*, 10 Chicago L. N. 380, where three years' acquiescence on the part of complainant was deemed a sufficient reason for denying relief. The application for the writ cannot properly be made by a stranger. He ought to be either a party to the proceeding sought to be vacated, or else directly interested in it either in person or in a representative capacity, as where he is heir, executor, administrator or devisee of one of the parties: *Bath Bridge Co. v. Magoun* 8 Greenl. 292.

WHEN THE WRIT MAY ISSUE.—According to the English practice a writ of certiorari might be sued out before or after judgment: Tidd's Pr. 398. In *Commonwealth v. Simpson*, 2 Grant's Cases, 438, it is said that certiorari is the appropriate writ to remove a cause before judgment, while a writ of error is the proper writ to remove it after judgment. In New Jersey, where the object is to review the proceedings of a municipal corporation on the ground that it is acting beyond its corporate authority, the writ is frequently permitted to issue before the proceeding is consummated: *State v. City of Patterson*, 39 N. J. L. 489. But, according to the more modern practice, the writ of certiorari is rarely granted, especially to an inferior judicial tribunal, until after final judgment: *Cuyler v. Trustees*, 5 T. & C. 609; 3 Hun. 549; *People v. County Judge*, 40 Cal. 479; *Road from Selin's Grove*, 2 S. & R. 419; *Smith v. Commissioners*, 1 Stew. 183. Thus, in delivering the opinion of the court in *Lynde v. Noble*, 20 Johns. 80, Woodworth, J., said: "It is admitted that this court possess, by the common law, authority to award a certiorari, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of the citizen, even in cases where they are authorized by statute finally to hear and determine; and this power can only be taken away by express words: *Lawton v. Commissioners of Highways*, 2 Cal. 182; 8 T. R. 542.

"The necessity of a superintending power to revise the proceedings, and correct the irregularities committed by inferior officers cannot be questioned; this is its legitimate office; it does not, before trial, withdraw the question to be tried from the inferior jurisdiction, but may subsequently cause it to be reviewed. When this certiorari was granted there had been no order, judgment, or trial; the magistrate had performed a ministerial act only; he had administered an oath and issued a summons. By allowing a certiorari, the superior tribunal would assume an original jurisdiction, instead of a power to review and correct."

WHETHER RIGHT TO APPEAL DEFEATS.—It has been said that the power of the superior courts to issue writs of certiorari is not withdrawn or defeated by implication; and therefore that it is not destroyed by the existence of the right to appeal or to resort to some other remedy: *Murfee v. Leeper*, 1 Overt. 1. In Texas, in certain cases, appeal and certiorari are concurrent remedies, and one may resort to the latter without giving any excuse for not pursuing the former: *Ray v. Parsons*, 14 Tex. 370. In New Jersey, also, the right to certiorari may, it seems, co-exist with the right of appeal, unless the statute declares otherwise: *N. J. R. R. v. Suydam*, 2 Harr. N. J. 25; *Krumick v. Krumick*, 2 Green, N. J. 39. We have already shown that the writ of certiorari is not a writ of right; that it issues in the discretion of the court upon good cause being shown. Where the party aggrieved can obtain redress by appeal or by writ of error, there is no reason why he should be allowed the unusual remedy by certiorari. In such a case the courts will almost uniformly deny him the writ, and leave him to resort to some other equally efficient correctory proceeding: *Davis County v. Horn*, 4 Greene, 94; *Petty v. Jones*, 1 Ired. 408; *State v. Williams*, 2 Hawks, 100; *Beck v. Knabb*, 1 Overt. 59; *O'Hare v. Hempstead*, 21 Ia. 33; *Savage v. Gulliver*, 4 Mass. 178; *Harwood v. French*, 4 Conn. 501; *Smith v. Parker*, 25 Ark. 518. There may, however, be special circumstances which address themselves to the discretion of the court with such force as to induce the granting of the writ, although the applicant once had an efficient remedy by appeal or writ of error. Thus, if the right to appeal has been lost to the applicant, without any fault or neglect upon his part, he may still, in some

of the states, obtain a review by means of certiorari: *Copeland v. Cox*, 5 Heisk. 172; *King v. Williams*, 7 Id. 303; *Melton v. Edwards*, 6 Id. 250; *Skinner v. Maxwell*, 67 N. C. 257; *Hardin v. Williams*, 5 Heisk. 385.

The Tennessee practice with respect to the writ of certiorari is thus stated in an early case: "The principal question submitted to the court upon this case for their opinion, is, whether the circuit court erred in discharging the rule to dismiss the certiorari and granting a new trial. The certiorari practice is now pretty well established, and its limits generally understood. Our first ideas of it were taken from North Carolina. Then it was used in such cases as might otherwise, without its intervention, leave the party remediless by the then practice of that state. It was considered as an extraordinary remedy appealed to, to supply a defect of justice in cases obviously entitled to redress, and yet unprovided for by their forms of proceeding. Cases of this kind were recovered in a court of record, against conscience, the injustice of which did not appear upon inspection of the record, and of course would not be corrected by writ of error; the iniquity of them could only be detected by an examination of the facts upon another trial. The law, it is true, has prescribed for this purpose the appeal, a process given in that term only in which the recovery was had. But, if by the act of the court, either oppressively or erroneously produced, the appeal was refused; or, if by the act of the clerk, negligently or willfully caused, the appeal was defeated; or, if by the contrivance or procurement of the adverse party, the same result was procured; or, even if by inevitable accident, or the misfortune without blame of the party injured, he was prevented from the benefit of a second investigation of the facts of the cause, by the prescribed mode of appeal, the certiorari was resorted to as the substitute for redress. But in all these cases it behooved the party praying for this extraordinary remedy, to have the merits on his side, and to pursue it in proper time. Time has always been considered as an important circumstance to be attended to in the certiorari practice, both in this state and the state of North Carolina; and that the redress by this means should be followed up as soon as possible after the happening of the occurrence which rendered it necessary to have resort to it." *Perkins v. Hadley*, 4 Hayw. 143. See upon the same subject: *Collins v. Nall*, 3 Dev. 224; *Kearney v. Jackson*, 1 Yerg. 204; *Mera v. Scales*, 2 Hawks, 364; *Baker v. Halstead*, Bush. 41; *Dousman v. City of St. Paul*, 22 Minn. 387.

WHAT MAY BE REVIEWED.—According to the English practice, the writ of certiorari might issue at any time during the progress of the action, and when sustained, the superior court commenced *de novo*, having no regard to the stage which the proceedings had reached in the other court: 5 Wait's Practice, 456. Under this practice, the whole merits of the controversy might be heard and determined in the court granting the writ. In this respect the relief upon certiorari was more comprehensive than that which can ordinarily be obtained by appeal or writ of error; for the usual practice of appellate tribunals does not extend beyond the correction of those errors of law which have entered into and tainted the proceedings in the subordinate court. In Texas, certiorari is yet employed to remove cases from the courts of justices of the peace to the district courts, where they are tried *de novo*: *Hill v. Fairmon*, 27 Tex. 428. But in the vast majority of these United States, the operation of the writ of certiorari is very limited, and the constant tendency, both of the courts and of the legislature, is to further restrict it. Thus the inferior tribunals are the sole judges of the weight of evidence, and their decision of an issue of fact is never reviewed upon certiorari, if there was any compe-

tent evidence to support it. The error sought to be reviewed, especially if the proceedings were had in some inferior court, must be an error of law; some action taken, either without authority, or upon erroneous principles, or in the absence of all evidence to justify it: *Starr v. Trustees*, 6 Wend. 564; *Independence v. Pompton*, 4 Hals. 209; *Ex parte Hayward*, 10 Pick. 358; *Ex parte Nightingale*, 11 Id. 168; *Williamson v. Carman*, 1 G. & J. 196; *Gracien v. Allen*, 2 Green, N. J. 74; *Andrews v. Andrews*, Id. 141; *Balthwin v. Calkins*, 10 Wend. 167; *Frankfort v. County Commissioners*, 40 Me. 389; *Derry Overseers v. Brown*, 13 Pa. St. 389; *Overseers v. Overseers*, 7 Watts, 527; *DeRocherbrune v. Southernier*, 12 Minn. 78; *Chicago R. R. Co. v. Whipple*, 22 Ill. 105; *Hyde v. Nelson*, 11 Mich. 353; *State v. Hudson*, 32 N. J. L. 365; *Lapan v. County Commissioners*, 65 Me. 160; *Farmington R. W. P. Co. v. County Commissioners*, 112 Mass. 206. New Jersey furnishes an exception to the statement that the tendency is to limit the operation of this writ. By a statute of that state, its effect has been somewhat enlarged, and in certain peculiar cases extends to the review of findings of fact: *State v. Perth Amboy*, 38 N. J. L. 425; *Gulick v. Groendylke*, Id. 114.

In North Carolina, this writ has recently been available to review the action of a court in improperly discharging a jury and refusing to discharge a prisoner: *State v. Jefferson*, 66 N. C. 309. The functions of this writ in New York, in one of the latest adjudications in that state, are stated to be as follows: "The office of a common law certiorari has been very much enlarged by the later decisions in this state, but there is no authority holding that questions of fact from conflicting evidence, or conflicting inferences which may be drawn from facts, or matters of judgment or discretion in a case justifying their exercise, can be reviewed. Only errors in law affecting materially the rights of the parties, may be corrected, and the evidence may be examined in order to determine whether there is any competent proof to justify the adjudication made." *People v. Board of Police*, 69 N. Y. 411; *People v. Smith*, 45 Id. 776. In the last-named case the court said: "Whatever may have been the conflict of authority heretofore upon the question, whether, upon a common law certiorari, the court can inquire into anything beyond the jurisdiction of the tribunal over the parties and the subject-matter, it must now be regarded as settled in this state, that it is the duty of the court, in addition thereto, to examine the evidence and determine whether there was any competent proofs of the facts necessary to authorize the adjudication made, and whether in making it, any rule of law affecting the rights of the parties has been violated." In the case of the *People v. Betts et al.*, 55 N. Y. 600, the proceedings of the defendants as commissioners to assess damages to certain real estate were brought up for review by certiorari. Folger, J., delivered the following as the opinion of the court: "The respondents are commissioners to assess the damages to the owner of certain real estate, taken by the relator for the purposes of its railroad. This proceeding is a common law certiorari, to bring up for review the proceedings of the respondents on a new appraisal, and the second report made by them in the same matter. The statute says that 'the second report shall be final and conclusive on all the parties interested.' Chap. 140, Laws of 1850, sec. 18; 3 Edm. Stat. at Large, 623. It is insisted by the learned counsel for the relator, that this bar to a review, applies only, to a second appeal technically so called upon the merits of the appraisal and report, and that the way is still open by a common law certiorari, for a review of any legal errors committed by commissioners, even upon a second appraisal. We fail to perceive how exemption is attained from the express prohibition of the statute, that the second report shall be final

and conclusive on all the parties interested, any more by a common law certiorari, than by any other proceeding for a review and correction of error. The office of a common law certiorari is, in strictness, merely to bring up the record of the proceedings of an inferior court or tribunal, to enable the court of review to determine whether the former has proceeded within its jurisdiction, and not to correct mere errors in its proceedings: *People ex rel. v. Commissioners of Highways etc.*, 30 N. Y. 27.

"True, it has been sometimes intimated, and sometimes held, that in the absence of any other remedy, and to prevent a failure of justice, the party will be suffered by it to bring up not only the naked question of jurisdiction, but the evidence, as well as the ground or principles on which the inferior body acted, and the questions of law on which the relator relies: *Susquehanna Bank v. Supervisors etc.*, 25 N. Y. 312; *Baldwin v. Buffalo*, 35 Id. 390; *Swift v. Poughkeepsie*, 37 Id. 511. Many cases are cited in *The People v. Assessors*, 39 N. Y. 81, and it is there held that the office of the writ extends to the review of all questions of jurisdiction, power and authority of inferior tribunals to do the acts complained of, and to all questions of regularity of their proceedings. In *People v. Assessors*, 40 N. Y. 154, it is held that the writ may bring up for review, the decision that a given state of facts is not legally sufficient to compel a board of assessors to the conclusion that certain property was not liable to assessment; in other words, a decision of law. See, also, *People v. Board etc.*, 39 N. Y. 506; *Freeman v. Ogden*, 40 Id. 105; *People v. Hamilton*, 39 Id. 107; *Western R. R. Co. v. Nolan*, 48 Id. 513. In *People v. Delaney*, 49 N. Y. 655, inclining the other way, it was held that a departure by assessors from the statutory standard for estimating the value of property on the assessment roll, cannot be corrected upon certiorari. In *People v. Supervisors etc.*, 51 N. Y. 442, it was held that it was the office of a certiorari to review the determinations of inferior boards, where a claim was rejected as not just or legal. And in *People v. Allen etc.*, 52 N. Y. 538, a certiorari brought up for review the decision of the defendants upon a question of law.

"It is thus seen that the office of a common law writ of certiorari has been somewhat enlarged since the decision in 30 New York, *supra*. But it will also be seen, that it is in cases where the relator has no other available remedy, and where injustice would be done if the writ was not permitted to do its work. The rule still remains unimpaired, at least in principle, that where there is a remedy by appeal the writ will be confined to its original and more appropriate office: *Storm v. Odell*, 2 Wend. 287; see, also, *In re Mt. Morris Square*, 2 Hill, 14-27.

"And now the appellants say the writ should lie in this case, for there is no remedy by appeal from a second appraisal and report. True, because the statute says that it shall be final and conclusive upon all parties interested; not because an appeal is not the appropriate remedy. An appeal is the method provided by law for remedying erroneous action of commissioners of appraisal. And when the statute says that the second appraisal shall be final and conclusive, it is not that it means only to refuse that mode of remedy, but that it means to deny any remedy. Nor do any of the decisions above cited authorize, hold, or intimate that, in such case, the common law writ of certiorari may be availed of to review erroneous decisions or proceedings of boards or inferior tribunals. It follows that the writ of certiorari in this case should have been quashed." *Schuylerville & U. H. R. R. v. Betts*, 55 N. Y. 600. In Minnesota, "when a court acts in a summary manner, or in a new course, different from the common law, in the absence of legislative

restriction, a certiorari lies; and the effect of the writ in such a case is to bring before the court for examination and revision, the record, the proceedings in the nature of a record, the rulings of such inferior tribunal upon the admission or rejection of testimony, the instructions given and refused to the jury, with the exceptions taken, together with so much of the evidence as may be proper to show the bearing of such rulings and instructions and prejudice to the petitioner:" *City of St. Paul v. Marvin*, 16 Minn. 104; *Tierney v. Dodge*, 9 Id. 166; *The Minn. C. R. R. Co. v. McNamara*, 13 Id. 509. According to the decisions made in New York and Minnesota, if we can correctly comprehend them, the correctory supervision of the superior court, in a case where it thinks proper to act, is about equal in extent to that which may be obtained in most appellate tribunals, by an appeal both from the judgment and the order denying a new trial, viz.: the party aggrieved may show that some error of law was committed to his prejudice either in drawing an incorrect conclusion from established facts, or in giving improper relief, or in withholding relief, or in proceeding outside of its jurisdiction, or in admitting or excluding evidence, or in making a finding without any evidence to support it. Even in these states we presume some special grounds must exist before a certiorari will be awarded, while the applicant has an efficient remedy by appeal.

In Wisconsin, "It is well settled by numerous adjudications, that, upon certiorari to an inferior court, the court out of which the writ issues, will only inquire into errors or defects which go to the jurisdiction of the court below, and for all other errors or irregularities, the party must resort to his remedy by appeal or writ of error. The rule has been more frequently applied where the writ has been sent to a justice of the peace, but is equally applicable to any case where the writ issues to a court which proceeds according to the course of common law, whether of record or otherwise." *Hauser v. The State*, 33 Wis. 680. But in this state, if a tribunal proceeds in a summary manner, and not according to the course of the common law, and there is no remedy by appeal, then the courts will consider other than jurisdictional questions: *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444; see, also, *Applying v. Bailey*, 44 Ala. 333; *Wyatt v. Burr*, 25 Ark. 476. The principle that if the inferior court had jurisdiction, mere errors in the exercise of that jurisdiction cannot be corrected by certiorari, where there is any other available mode of redress, prevails very extensively: *Doolittle v. Galena R. R. Co.*, 14 Ill. 381; *Frankfort v. Co. Coms.*, 40 Me. 389; *Flourney v. Payne*, 28 Ark. 87; *Monreal v. Bush*, 46 Cal. 81; *Central P. R. R. Co. v. Placer Co.*, Id. 667; *Wilkowski v. Skalouski*, 46 Geo. 41; *Peacock v. Leonard*, 8 Nev. 84; *Yenawine v. Richter*, 43 Cal. 312; *Morley v. Elkins*, 37 Id. 454; *People v. Elkins*, 40 Id. 642; *Andrews v. Pratt*, 44 Id. 309; *Givens v. State*, 27 Wis. 456; *Baxter v. Brooks*, 29 Ark. 173; *Chittenden v. State*, 41 Wis. 285; *Wardsworth v. Sibley*, 38 Id. 484; *Phillips v. Welch*, 12 Nev. 158; *Matter of Wizoni*, 12 Id. 219; *Hetzell v. County Commissioners*, 8 Id. 359; *Locke v. Selectmen of Lexington*, 122 Mass. 290.

TO WHAT TRIBUNALS THE WRIT MAY ISSUE.—The legitimate function of the writ of certiorari is to obtain a review of proceedings which are judicial or quasi judicial in their character. It does not bring up for review the action of a board, person or tribunal, which is legislative, ministerial or executive in its nature: *Stone v. Mayor of N. Y.*, 25 Wend. 157; *People v. Mayor of N. Y.*, 2 Hill, 9; *Ex parte Mayor of Albany*, 23 Wend. 277; *People v. Mayor of N. Y.*, 5 Barb. 46; *People v. Supervisors*, 1 Hill, 195; *People v. Corwin*, 68 N. Y. 403; *Robinson v. Supervisors*, 16 Cal. 208; *Thompson v. Mult-*

nomah Co., 2 Oregon, 34; *C. P. R. R. Co. v. Placer Co.*, 43 Cal. 365; *Mil-land Co. v. Auditor-general*, 27 Mich. 165; *People v. Bush*, 40 Cal. 344; *Locke v. Selectmen of Lexington*, 122 Mass. 290; *Contra Campbell v. Mulford*, 2 Dutch. 49, holding that legislative acts of municipal corporations are subject to review. The text is to inquire not what are the usual functions exercised by the tribunal, but what is the character of the proceeding sought to be reviewed. Thus a judge may be invested with some ministerial authority, and an executive officer is occasionally charged with the performance of functions of a judicial nature. In such cases the action of the judge cannot be reviewed on certiorari: *Pugsley v. Anderson*, 3 Wend. 468; *Pearsall v. Commissioners*, 17 Id. 15; *People v. Bush*, 40 Cal. 344; while the action of the executive officer can be so reviewed. Certiorari may issue to the following among others boards, or tribunals when in the exercise of judicial functions, viz., to boards of supervisors: *People v. El Dorado County*, 8 Cal. 58; *People v. Supervisors*, 51 N. Y. 442; *Keys v. Marin Co.*, 42 Cal. 252; to board of delegates of a fire department: *Whitney v. Board of Delegates*, 14 Cal. 479; to commissioners to partition lands: *Dyer v. Lowell*, 30 Me. 217; to commissioner of insolvency: *Anonymous*, 1 Wend. 90; to commissioners of highways: *Goodwin v. Halliwell*, 12 Me. 271; *Thompson v. Multnomah Co.*, 2 Oregon, 34; to commissioners of assessment in street cases: *Matter of Carlton Street*, 20 Wend. 684; *Commissioners v. Claw*, 15 Johns. 537; to the mayor and aldermen of a city, acting in reference to the laying out or vacating of streets: *Parks v. City of Boston*, 8 Pick. 218; *Stone v. Boston*, 2 Met. 220; to commissioners to settle boundaries: *State v. Coleman*, 1 Green, 98; to county commissioners: *Fairfield v. Commissioners*, 66 Me. 385; *Bangor v. County Commissioners*, 30 Id. 270; *Gibbs v. Hampden*, 19 Pick. 298; *Mendon v. County Commissioners*, 2 Allen, 463; to township trustees: *Jordon v. Hayne*, 36 Ia. 9; to commissioners to set aside a homestead: *Wilson v. Lowe*, 7 Coldw. 153; to trustees of schools, in proceedings for the consolidation of districts: *Miller v. Trustees of Schools*, 10 Chicago L. N. 381; and to the aldermen or boards of trustees of municipal corporations in a variety of cases: *Macon v. Shaw*, 16 Geo. 172; *Camden v. Mulford*, 2 Dutch. 49; *Mayor and Aldermen v. Pearl*, 11 Humph. 149; *Bradshaw v. City Council*, 39 N. J. L. 416; *State v. City of Patterson*, 39 Id. 489; Dillon's Mun. Corp., secs. 368, 423, 476, 628, 643, 739-742, and notes thereto. While certiorari is one of the most efficient means of testing the jurisdiction of an inferior court or tribunal, it is not available for the purpose of trying the title to office of the persons who are acting in such court or tribunal. It is not a substitute for *quo warranto*: *Coyle v. Sherwood*, 4 T. & C. 35; 1 Hun, 272; *Fractional School District v. School Inspectors*, 27 Mich. 3.

THE RETURN AND ITS EFFECT.—“The officer or court to whom the writ is addressed is required to comply with the order of the certiorari, by returning and certifying the record of the proceedings of the inferior tribunal, or whatever notes or entries have been made by it in the nature of a record. But no more of the facts of the case can be required to be returned, or will be looked into by the court, than those which are necessary to determine the point of jurisdiction, or other question of law arising on the proceedings. The evidence is not brought up by the writ.” 5 Wash. Pr. 476, citing *Rathbun v. Sawyer*, 15 Wend. 451; *People v. Goodwin*, 5 N. Y. 568; *People v. Board of Police*, 16 Abb. 337; *People v. Mayor of N. Y.*, 2 Hill, 9; *People v. Knowles*, 47 N. Y. 415. Generally the return is treated as conclusive and no extrinsic evidence will be received neither to support nor to overthrow the proceeding, order, or judgment, which is sought to be reviewed: *Fore v. Fore*,

44 Ala. 478; *Tewksbury v. Commissioners*, 117 Mass. 563; *Emery v. Brann*, 67 Me. 39; *Pike v. Herriman*, 39 Id. 52; *Ross v. Ellsworth*, 49 Id. 417; *Rutland County v. Commissioners*, 20 Pick. 71; *McGregor v. Supervisors*, 37 Mich. 388; *Hannibal R. R. Co. v. State Board of Equalization*, 64 Mo. 294; *State v. Board of Equalization*, 7 Nev. 83; *People v. Ryken*, 13 N. Y. S. C. 625; *Baizer v. Lasch*, 28 Wis. 268; *Redmond v. Anderson*, 18 Ark. 449; *Miller v. McCullough*, 21 Id. 426; *Deputy v. Betts*, 4 Harr. Del. 352; *Gervais v. Powers*, 1 Minn. 45; *Callon v. Sternberg*, 38 Wis. 539. In some cases it has been held that if the jurisdiction of the lower court is questioned, the evidence upon that subject must be returned and may be reviewed: *Whitney v. Board of Delegates*, 14 Cal. 479; *People v. Goodwin*, 5 N. Y. 568; *Cullen v. Lowery*, 2 Harr. Del. 459.

CERTIORARI AS AN AUXILIARY REMEDY, may be awarded by an appellate court to bring up such entries, records, and proceedings, existing in the lower court as are essential to the determination of the appeal on its merits: *United States v. Adams*, 9 Wall. 661; *Gregory v. Slaughter*, 19 Ind. 342; *Chinn's Petition*, 2 Monr. 371; *Blanton v. Breckenridge*, 6 Litt. S. C. 25; *Boyle v. Connelly*, 2 Bibb, 7; *State v. Collins*, 3 Dev. 117; *Thatcher v. Miller*, 11 Mass. 414; see *Judson v. Eslava*, ante, 32.

KERR v. CALVIT.

[WALKER, 115.]

MISTAKE IN A DEED.—Parol evidence is not, where there is no charge of fraud, admissible to show a mistake in the number of acres mentioned in a deed.

MERGER OF AGREEMENT INTO A DEED.—When a deed is made in pursuance of a prior agreement, the agreement is thereby made a nullity, and the rights of the parties are controlled by the deed.

PROOF OF CONSIDERATION.—In the absence of fraud, the consideration of a deed can not be impeached by parol evidence having relation to a period anterior to the delivery of the deed.

ACTION on a promissory note. The opinion states the case.

By Court, HAMPTON, J. This action was instituted on a note of hand, made by Huldah S. Covington, now the wife of defendant, Thomas Calvit, and by John Vandervall, dated the fourteenth of October, 1818, for two thousand dollars, payable to plaintiff, first of January, 1820. It appeared in evidence, under the general issue, that this note had been given in part consideration of a tract of land, sold by plaintiff's agent to Mrs. Covington, then a *feme-sole*, and defendant contended that there had been a partial failure of consideration, and fraudulent misrepresentations in effecting the sale, which would entitle him to a reduction of the amount stipulated for payment. The judge submitted to the jury the questions: 1. Whether the land

was sold in gross or per acre; 2. Whether there were fraudulent representations on the part of plaintiff's agent? The jury found a verdict for eight hundred dollars and twenty-five cents, and plaintiff moved for a new trial for reasons filed, which question is referred. It is conceded that the deed contained a warranty for not more than two hundred and forty or two hundred and fifty acres, neither specifically conveyed more, and that the consideration set out in the deed, and for one half of which this note was given, was four thousand dollars. In addition to the notice which the purchaser had from this express language of the deed, it is in evidence that she was duly notified of the deficiency of the land, before she took the deed, and agreed to its stipulations. It is not pretended that any malpractice was used at the time of signing the note and receiving the deed, such as a misrecital of the terms of the deed to one unable to read, but all the evidence, which by any construction could imply fraudulent representations, goes to a period anterior to the deed, and is removed thereby, where the party states the true quantity, and the true price, of which Mrs. Covington could not but be cognizant; all that the deed engages for stands complete, no deficiency in regard to the quantity it warrants, but it is sought to affect the consideration it acknowledges, by a reduction, in consequence of conversations which passed between the parties prior to the consummation of the contract. If there was any deficiency of what the deed calls for, under our statute, this defense would well obtain. But how can we depart from the covenant contained in the deed, which settled the contract, to loose conversations long anterior to it? No part of the evidence reported by the judge has any immediate relation to the time of the delivery of the deed. A witness, named James Bouth, whose deposition is in evidence, says he was a subscribing witness to the deed, but not present at its delivery, and cannot, therefore, speak as to what passed between the parties. That at the time of signing the deed, he expressed some surprise at the quantity, being only two hundred and fifty acres, since he understood the sale to have been for four hundred acres, the quantity he always supposed till then, contained in the tract. Terry told him that Mrs. Covington might get four hundred acres, more or less; denies that Terry ever told him he had warranted the four hundred acres. Witness lived on the land a year, and all this time supposed the tract to contain four hundred acres. A witness of the name of Take, whose deposition is in evidence, states,

that he was present at the sale, and that two hundred and fifty acres was the quantity, and the consideration, four thousand dollars. He is the only witness who appears to know anything of what passed between the parties at the time of closing the contract, and he says nothing of any improper inducement having been presented to Mrs. Covington, to accept the deed. The inference from all the evidence is clear and satisfactory, that Terry sold the land for two hundred and fifty acres, on warranty; yet believing it probable, like many of the old surveys, it might contain more, perhaps five hundred acres, and that Mrs. Covington bought it, content with the assurances of the deed, yet under reasonable hopes, and perhaps belief, that the tract contained more, perhaps four hundred acres. This is certainly more reasonable than the inference contrary to the express tenor of the deed, that she bought the land at ten dollars per acre, and stipulated to pay for one hundred and fifty, at this rate, more than the vendor was willing to warrant.

In *Hawes v. Baker*, 3 Johns. 506, the marginal summary of the principles of decision is, "where B., by articles of agreement, covenanted to sell and convey to H. a tract of land, at nine pounds per acre, and a deed was accordingly executed, and the purchase-money paid according to the quantity of acres expressed in the deed, it was held, that no parol evidence was admissible to show that there was a mistake in the quantity mentioned in the deed, and that an action for money had and received to recover back the money paid for the number of acres alleged to be deficient, was not maintainable."

Considering the cases analogous in principle, we shall adopt the language of Thompson, J. "There is no instance of any fraud having been practiced on the plaintiff. The most that can be alleged is, that there has been a mistake with respect to the insertion of the consideration-money in the deed. The contract between the parties, according to the articles of agreement, was executory, and having been executed and consummated by the deed subsequently given, the agreement became null and of no further effect. This is not like the case of *Waiver v. Bentley*, 1 Cai. 48. The court there sustained the action for money had and received, on the ground that the defendant having altogether failed to perform the contract on his part, the plaintiff had his election either to proceed on his covenant for damages, or to disaffirm the contract, and to bring his action to recover back the money he had paid. The present case, however, is not one where the plaintiff claims the right of

disaffirming the contract, but has consummated it by the acceptance of a deed. The deed cannot be considered as an execution of the contract in part only. If an execution at all, it must be of the whole contract, and the articles of agreement are a nullity. If so, the testimony offered in support of the plaintiff's action, to show that the consideration expressed in the deed was more than ought to have been paid, could be viewed in no other light than as parol evidence, repugnant to the written contract. That such testimony is not admissible, has been repeatedly ruled in this court: 2 Cai. 171; 1 Johns. 418. The language of the court in those cases, was, that it cannot be a safe or salutary rule to allow a contract to rest partly in writing and partly in parol. Whenever it is reduced to writing, that is to be considered the evidence of the agreement, and everything resting in parol become thereby extinguished."

In the case of *Schemerhorn v. Vanderheyden*, 1 Johns. 140 [3 Am. Dec. 304], the court say: "The consideration for the assignment is expressly stated in the deed of assignment itself, and the parties are thereby precluded from setting up any greater or different consideration. To allow of parol evidence for that purpose would be to extend or substantially vary the language of a written contract. Though the promise in question may have been made previously to the assignment, yet after the execution of the instrument we must presume that the father and son altered the consideration mentioned at first, and finally acted upon that which is set forth in the assignment."

So in the case before us, we must presume, after the execution of the deed, that the consideration therein mentioned was the one finally agreed on between the parties. In the absence of fraud, which we consider this case not corrupted with, it will readily be conceded, on the basis of these and many other authorities in the books, that unless, under our statute, the consideration for the land sold by the agent of Dr. Kerr to Mrs. Covington could not be impeached by parol evidence having relation to a period anterior to the delivery of the deed, the statute, as we have before remarked, will not alter the case, except when there be a deficiency of the quantity mentioned in the deed.

As our statute broaches the contract so as to let in an inquiry into the consideration, we do not deem it necessary to look into the common law doctrine in regard to defenses to be set up where there has been fraud, a partial or entire failure, or want

of consideration. Without intending solemnly to adjudicate these points, we intimate an opinion that in the absence of fraud, no defense can be set up at law on pretense of a partial failure of the consideration; but such defense can be made where there is an entire want of consideration, *ab initio*, or an entire failure subsequently, whenever such failure would subject the plaintiff, and where a partial failure is combined with fraud, we are inclined to the opinion such defense would be heard: 1 Campb. 40, note; 2 Id. 346; 3 Johns. 506 [*Howes v. Barker*, 3 Am. Dec. 526]. The first of these points most doubtful.

The cases 1 and 2 Bay, proceed much upon the civil law principles. Considering all the circumstances in this case, we are of opinion that a new trial be granted. Let a *venire de novo* be awarded, and the costs abide the final result.

ELLIS and WINSTON, JJ., concurred.

THAT PAROL EVIDENCE IS INADMISSIBLE to control the terms of a written instrument is a principle frequently enunciated by the courts of this state: *Young v. Jacoway*, 9 S. & M. 212; *Brantley v. Carter*, 4 Cush. 282; *Whitworth v. Harris*, 40 Miss. 483; *Hernidon v. Henderson*, 41 Id. 584; *Cocke v. Bailey*, 42 Id. 81; *McGuire v. Stevens*, Id. 725; *Kerr v. Kuykendall*, 44 Id. 137. For the adjudications of other states upon this subject, see *Thompson v. White*, 1 Am. Dec. 252, and note; *Snyder v. Snyder*, 6 Id. 493; *Gathin v. Kilpatrick*, Id. 557; *Stevens v. Cooper*, 7 Id. 499.

STATE v. MOOR.

[WALKER, 184.]

DISCHARGE OF JURY.—A jury, if unable to agree, may, even in a criminal case, be discharged at the end of the term, and also in other cases of inevitable necessity.

CONSTITUTION OF UNITED STATES.—The provision of the constitution of the United States providing that no person shall be twice put in jeopardy for the same offense, is binding on the state courts.

JEOPARDY.—When the jury is necessarily discharged without giving a verdict, the defendant has not been so in jeopardy as to prevent his again being put on trial.

INDICTMENT for grand larceny. The opinion states the case.

By Court, ELLIS, J. From the record in this case, it appears that at the last term of the circuit court of Adams county, the following order was spread upon the minutes: "At twelve o'clock on Saturday night, the last day of the term, the jury in

this prosecution not having agreed upon their verdict were discharged by the court, without the consent, and against the wish of the prisoner, and the prisoner is forthwith ordered to be remanded to the prison of Adams county." The first authority upon the question now submitted for the consideration of the court, is to be found in Coke on Littleton, sec. 366, letter F, where the principle is laid down in broad terms: "A jury charged and sworn in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict." The same doctrine is to be found in 3 Inst. 110, where Lord Coke says: "To speak it here once for all, if any person be indicted of treason or of felony, or of larceny, and plead not guilty, and thereupon a jury is returned and sworn, their verdict must be heard, and they cannot be discharged; neither can the jurors in those cases give a privy verdict; but ought to give their verdict openly in court."

It seems to have been admitted at bar in the argument that the only case referred to by Lord Coke to support the rule he laid down, had no applicability, for it was the case of an approver to be found in the year books during the reign of Edward III., in which it was adjudged "that a person indicted for larceny, and who had pleaded not guilty, and put himself upon his country, should not afterwards, when the jury was in court, be admitted to become an approver, because, by solemnly denying the fact by his plea, he had lost all credit, and ought not to be received as a witness against others." Sergeant Hawkins and Mr. Justice Blackstone adopted the rule in the Institutes, and refer to those books as authority. I find from an examination of the case of the *Two Kinlocks*, Foster, 27, the judges did not consider the resolution as reported in Carthew, entitled to much respect, as there was no authentic report of the case. So far as we have been able to understand this case as reported by Chief Justice Eyre, Holt is reported to have said: "I have had occasion to consider of this matter. In criminal cases, a juror cannot be withdrawn but by consent. And in capital cases it cannot be done even with consent." It is evident the learned judge did not intend to lay down a general rule upon this subject; but to prevent the exercise of an unreasonable and oppressive claim on the part of the prosecutor, who, it seems, after the jury had been charged with the deliverance of the accused, found his evidence insufficient to produce a conviction, prayed to have a juror withdrawn, and the cause to be continued until such time as he might be pre-

pared with his testimony. An application so unprecedented, even in those days, could not fail to strike the court as unwarranted by precedent and principle, and contrary to the known and established rights of every subject of the realm. Subsequent to the resolution reported in Carthew, many cases can be found where the courts have discharged juries where the crown was not prepared with its testimony. This was done in the cases of *Whitebread* and *Fearnwick*, reported in the state trials, and deemed by all humane and enlightened judges of the present day, an arbitrary and unjustifiable exercise of discretionary power. Mr. Justice Foster, in his able and elaborate review of all the authorities in the case of the *Kinlocks*, does not deny the general position that a jury can be discharged under particular circumstances, when he says: "It seems that an opinion did once prevail, that a jury once sworn and charged in any criminal case whatsoever could not be discharged without giving a verdict, but," he says, "this opinion is exploded in *Ferrars's case*, and it is there called a common tradition which had been held by many learned in the law."

An information was exhibited against Ferrars for forgery, and it was resolved by all the justices that although the jury be charged and sworn in the case of a plea of the crown, yet a juror may be drawn, or the jury dismissed, contrary to common tradition, which hath been held by many learned in the law: Sir Thos. Raym. 84. From this view of the old authorities, without resorting to the numerous cases in Kelyng's, it will be admitted the court has the power of discharging juries in capital cases under circumstances of great necessity. What circumstances of necessity will be considered as sufficient to warrant our interposition in the exercise of high discretionary powers in such cases, is a matter of great doubt and delicacy. I am fully persuaded it will be difficult and dangerous to establish any general rule upon this subject, therefore we shall confine ourselves to the record before us, and not hazard the establishment of a precedent which may, in its operation, turn loose the murderer upon society, or sacrifice the innocent to the flexibility of its principles.

It was urged with considerable force and ability that the defendant is entitled to his discharge, because the jury separated contrary to his consent before they agreed on their verdict; and secondly, the fact of their not being able to agree raises such presumption in favor of his innocence, as ought to be tantamount to an acquittal. These positions cannot be sus-

tained without all the evils resulting from a general rule; hence we have thought it prudent to confine ourselves to the particular circumstances of the case. So far as the American authorities touch this case, I think there can be no doubt as to the result of our conclusions. In the case of the *Commonwealth v. Bowden*, 9 Mass., the court was clearly of opinion that a juror could be withdrawn in a case of felony without operating as an acquittal; but I believe the exercise of discretionary power in that case, uncontrolled by any circumstance of absolute or inevitable necessity, extended the doctrine too far. The court declares "the ancient strictness of the common law upon this subject has very much abated in the English courts; nor would it be consistent with the genius of our government or laws to use compulsory means to effect an agreement among jurors. The practice of withdrawing a juror where there existed no prospect of a verdict has frequently been adopted at criminal trials in this court, and the exception taken in this case cannot prevail." The same doctrine has been held in the case of *The Commonwealth v. Wood & Sherburn*, on an indictment for larceny. The case of *The People v. Olcott*, ruled by Justice Kent, in 2 Johns. Cas. [1 Am. Dec. 168], is very full upon the subject which extends not only to misdemeanors, but to capital cases. He says: "With respect to misdemeanors, we may with perfect safety and propriety adopt the language of Sir M. Foster, 27, which he, however, applies to capital crimes, that it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases that may come under the general question, touching the power of the court to discharge juries sworn and charged in criminal cases," which evidently implies, if the court is satisfied the jury have made long and unsuccessful efforts to render a verdict, and in all human probability there be but little prospect of their agreeing; every principle of humanity and public justice would seem to require they should be delivered of their charge, and the prisoner remanded. I believe there is not a single case to be found in the books, where the court is precluded from the exercise of a discretionary power in discharging the jury if the prisoner should put himself upon the country, in a fit of insanity—so in the case of the jury becoming intoxicated—so if one of the jury fall down in a fit of apoplexy—so if one of the jurors be mentally diseased, or incurably prejudiced against the accused—so if the jury be separated and dispersed by an armed force;—and so, also, if the judge be incapacitated from presiding over

the trial. In all these cases, I presume it will not be pretended the prisoner would go without day. If such a doctrine be established and declared to be the law of the land, the ends of justice would be defeated, and the most abandoned and depraved villains would be virtually licensed in the commission of the most unparalleled atrocities.

Every principle of public policy and expediency protests against such a state of things, and I think the corrective must, from the very nature of things, rest in the breast of the court, in the exercise of a sound discretion, controlled by the cases cited, for the protection of the prisoner from unreasonable and oppressive prosecutions. The defendant's counsel relied much upon the fifth article of the amendment to the constitution of the United States, which contains the following provision: "Nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb." I must confess, this amendment to the constitution of the United States created the only doubt I have ever entertained on this important question. It was properly admitted in argument that this provision of the constitution was binding in the United States, as well as the state courts of the union, for I take it, it has never been questioned but that the constitution of the United States is the paramount law of the land, any law, usage or custom of the several states to the contrary notwithstanding. What was intended by the framers of the constitution when they declared, "Nor shall any person be twice put in jeopardy of life or limb for the same offense." Chief Justice Spencer, in the case of the *People v. Goodwin & Johns*. [9 Am. Dec. 303], gives a very learned and able opinion upon this subject, and shows what must have been the intention of those who framed this article. But it is asked, why insert a provision in the constitution for the protection of the citizen, which had been repeatedly and unequivocally recognized by the whole current of English authority? This question will be satisfactorily answered by a recurrence to the history of the times, not very long after the establishment of our independence, when every state and every individual in the community were jealous of their rights and liberties—privileges which they had rescued at the hazard of their lives and fortunes from the throes of the revolution, and secured by a solemn recognition in the charter of their political freedom. They did not wish to leave anything in doubt, when they looked back with horror and indignation to the judicial despotism of a Jeffries. The prisoner, it is said, was in jeopardy from the

very moment the jury was impaneled to try him, but I cannot persuade myself that such is the fair construction to be given to the amendment. The forms prescribed by law, to ascertain the guilt or innocence of the accused, cannot properly be considered that kind of jeopardy contemplated by the constitution of the United States; but the means used by courts of law in attaching the jeopardy, which can never take place, until after the rendition of the verdict by the jury charged with the deliverance of the accused. Such I conceive to be the construction which ought to be placed upon this word. A prisoner must in all cases answer to his offense, before he can be considered in jeopardy.

And will it be contended, if any one of the facts necessary to constitute the whole of an answer be wanting, that the others will be sufficient in contemplation of law? But we are met by this objection: Suppose the court place it out of the power of the prisoner to answer by discharging the jury, then I will answer and say, if the discharge has taken place unadvisedly, the cases controlling the undue exercise of such a power, will protect him, and the court will, in all such cases, be compelled to consider his answer as full and perfect, upon a plea of *autrefois acquit*. How stands the case here? The defendant, Moor, was arraigned, and pleaded not guilty, and put himself upon the country for trial, and a jury was regularly charged with his deliverance. After hearing the evidence and counsel on both sides, the jury retired to consider of their verdict, and not being able to agree, they were discharged at the very last moment of the term, when the powers of the court and jurors ceased. Was this the exercise of a discretionary power, used for the purpose of oppressing the prisoner? Certainly not. It was a case of inevitable necessity, which grew out of the operation of the law, known to the prisoner, and over which the court could have no control. I cannot distinguish this case of inability in the jury to act, from those I have already mentioned, where the jury, either from intoxication, or if they be bodily or mentally diseased, are incapacitated from the discharge of their duties. The case of *Cook et al.*, cited from Pennsylvania, does not deny the power of the court, under imperious cases of necessity, to discharge the jury. Chief Justice Tilghman, in giving his opinion, said it was the duty of the justices, who tried the case, to give separate verdicts, although the jury could not agree as to the other. There was no fact on the record to show which of the parties were entitled to the verdict the jury were ready

to give in, therefore, the learned judge correctly observed, he would jeopardize the lives of innocent men, who had a right to claim their verdict on the trial below, more especially as it did not appear to the court there was an absolute necessity of discharging the jury at the time they separated. He observes, when speaking of *Goodwin's case*, "this argument, it must be confessed, reached to all cases of felony, but still he prudently confined his opinion to the case before the court, in which there was an ingredient of some weight, not found in any other case, and that was, that the time of the court sitting was to expire in half an hour, and there was a moral certainty the jury would not agree in so short a time."

The case decided by Mr. Justice Story, 2 Gall. 364, lays down the position, the courts have the power of discharging juries under striking circumstances of necessity.

We are of opinion the judge acted in conformity with the well established principles of law, in discharging the jury, and remanding the prisoner to take his trial at the next term.

THE INABILITY OF THE JURY TO AGREE is now generally regarded as such a necessity as will warrant the discharge of the jury, in the discretion of the court, even against the prisoner's protest, and such discharge will be no impediment to a second trial for the same offense: *United States v. Perez*, 9 Wheat. 579; *Ex parte Lange*, 18 Wall. 163; *Lester v. State*, 33 Ga. 329; *State v. Walker*, 26 Ind. 346; *Dobbins v. State*, 14 Ohio St. 493; *McCreary v. Commonwealth*, 29 Penn. St. 323; *State v. Honeycutt*, 74 N. C. 391; *Ex parte Maxwell*, 11 Nev. 428; *Ex parte McLaughlin*, 41 Cal. 211; *People v. Cage*, 48 Id. 323; *Crookham v. State*, 5 W. Va. 510; *Hoffman v. State*, 20 Md. 425; *People v. Olcott*, 1 Am. Dec. 168. and note; *State v. Woodruff*, 2 Id. 122; *People v. Barrett*, Id. 239; Proffatt on Jury Trial, sec. 485 *et seq.*; Story on the Constitution, sec. 1787. The prevailing doctrine upon the constitutional provision that "no person's life or liberty shall be twice placed in jeopardy for the same offense," is stated in the opinion of the court delivered by Chalmers, J., in the recent decision of *Teal v. State* 53 Miss. 439, 453, as follows: "There are few questions in the criminal law upon which the authorities are more irreconcilably at conflict than the one presented by these antagonistic views. Without elaborating a question which has been so often and so exhaustively discussed, we feel no hesitation in announcing our concurrence in that line of decisions which hold that a party is placed in jeopardy whenever upon a valid indictment in a court of competent jurisdiction and before a legally constituted jury his trial has been fairly entered upon, and that if thereafter the jury is illegally, improperly and unnecessarily discharged by the court, it operates as an acquittal, so that he can never thereafter be arraigned for the same offense. It was held in *Price's case*, 36 Miss. 531, that the court could discharge a jury who were unable to agree, and that such discharge would not operate as an acquittal; and some portions of the language used in that case would seem to inculcate the doctrine that nothing short of an actual verdict of acquittal or conviction would support a plea of

former jeopardy. But in *Josephine's case*, 39 Miss. 613, it was expressly declared that the court could not discharge the jury except where there existed some legal necessity for so doing, as where it was demonstrated that they could not agree, or the term was about to expire, or some other legal or physical impossibility to the rendition of a verdict existed. In the doctrine thus stated we agree; nor does it in any manner conflict with the idea that an unauthorized and unnecessary discharge of the jury will operate as an acquittal. All will, perhaps, agree that it would have this effect, if against the protest or without the consent of the accused the discharge was arbitrarily, oppressively and tyrannically directed by the judge; for otherwise that official might discharge the jury whenever he saw or apprehended that the indications pointed to an acquittal, and thus, by summoning successive juries, at length compel a conviction."

THE EXPIRATION OF THE TERM before a verdict is rendered will be a discharge of the jury by operation of law, and will not be construed as an acquittal so as to bar a retrial: *State v. Jeffers*, 64 Mo. 376; *People v. Cage*, 48 Cal. 323; *Teat v. State*, 53 Miss. 439; *State v. Tilletson*, 7 Jones L. 114.

CONSTITUTION OF UNITED STATES, WHEN NOT APPLICABLE IN STATE COURTS.—The assumption in this case that the fifth amendment to the constitution of the United States furnished a rule for the guidance of state courts is an error. This amendment is a limitation on the powers of the federal government, and is not applicable to the legislation of the states: *Barn v. Mayor of Baltimore*, 7 Pet. (U. S.) 243; *Withers v. Buckley*, 20 How. (U. S.) 84; *Clark v. Dick*, 1 Dillon, 8; *Hollister v. The Union Co.*, 9 Conn. 436; *Livingston v. Mayor of New York*, 8 Wend. 85; *Railroad Co. v. Davis*, 2 D. & B. 451; *Powers v. Inferior Court of Dougherty Co.*, 23 Ga. 65; *Weimer v. Bunbury*, 30 Mich. 201; *Prescott v. State*, 19 Ohio St. 184.

GALE v. GREEN.

[WALKER, 159.]

RESCINDING CONTRACT OF PURCHASE.—A vendee in possession of land before conveyance has no right to rescind his contract of purchase, there being no eviction by title paramount.

BILL in equity. The opinion states the case.

By Court, ELLIS, J. The complainant represents in his bill that on the tenth of September, 1817, Thomas M. Green, in consideration that a certain Levin L. Cartwright agreed to pay him, the said Green, the sum of one thousand dollars, and had executed his several notes for the same, payable in installments, bargained and sold to the said L. L. Cartwright a certain lot or parcel of ground in the town of Greenville, containing forty square poles, etc., and that said Green executed to said Cartwright his bond in the sum of three hundred dollars, to make to said Cartwright, on or before the thirteenth day of January ensuing, a good and sufficient title, or general war-

ranty deed, and in fee-simple to the said lot and its appurtenances, and that some time after making the aforesaid contract he treated with said Cartwright for the purchase of said lot, and agreed with him to give the money therefor, that he, the said Cartwright, was bound to pay the said Green. It was then agreed by all parties that Cartwright's notes for the amount of the purchase-money should be canceled, and complainant's note given in lieu thereof, and that the bond from Green to Cartwright to convey title should be transferred to the complainant. The complainant further represents that he was let into the possession of the lot aforesaid, and immediately commenced making repairs and improvements of considerable value, in the full belief that said Green had a good title to the same, and would according to the tenor of his covenant convey title whenever it was required. In this he failed, and commenced suits upon the notes when they became due, and obtained judgment. The complainant concludes with the following specific prayer: For perpetual injunction, rescission of the contract, to raise an account to decree a specific performance of the covenant to convey title, and for general relief, etc.

The answer of defendant admits that the several contracts mentioned in complainant's bill were executed as therein stated, but that said Cartwright knew the title to said lot was then in respondent's mother, and that she was to make titles as soon as she returned to the country. Respondent denies he ever refused to make titles to complainant, but on the contrary, tendered the same, which were refused. The respondent derives title from a Spanish grant through his mother, as administratrix of the estate of his deceased father, Henry Green, who was authorized to sell the same by an act of the territorial legislature, passed on the seventh day of December, 1812. At a superior court of chancery, for the western district, held on the second Monday in January, 1823, this case was opened, upon a motion to dissolve the injunction, and after hearing counsel, and due deliberation being had thereon, the motion was sustained and injunction dissolved. An appeal was taken to this court. The complainant has no right to complain, it appearing from the time of the execution of the contract between L. L. Cartwright, Thomas Gale, and Thomas M. Green, that he was put into possession of the lot now in controversy, and has remained in possession ever since. If Green has complied with his covenant to convey title, which appears to be the fact, and that Gale remains in possession by virtue of the sale, how is it

to be said he can consistently ask for relief when it is manifest the covenant under which he seeks redress, has been entirely fulfilled. If there had been an eviction by a paramount title, subsequent to the tender of a deed of conveyance, we should feel no hesitation in staying the judgment at law until Green quieted complainant in the possession of the lot in contest, in strict conformity to the deed of covenant to convey title.

Decree of the chancellor affirmed.

HAMPTON, C. J., concurred.

POINDEXTER v. HENDERSON.

[WALKER, 176.]

INJUNCTION TO STAY WASTE will not be granted against a defendant in possession under an adverse title.

IRREPARABLE INJURY will authorize the issue of an injunction, where there is no adequate remedy at law.

INJUNCTION AGAINST TRESPASS may be granted in special cases.

BILL in equity. The opinion states the case.

By Court, ELLIS, J. The complainant sets forth in his bill: That on the third day of July, in the year of our Lord one thousand eight hundred and twenty-one, a public sale of the land of the United States was held in the town of Washington, in obedience to the proclamation of the president of the United States, at which sale Elijah Smith became the purchaser of sundry tracts or parcels of land, amounting in the whole to about the quantity of seven hundred and sixty-five acres; that said Smith made full payment for the land so purchased, and obtained from the register of the land-office, west of Pearl river, final certificates, according to the laws of the United States; that afterwards, on the twelfth of September, 1821, complainant became the purchaser of the above-named land from said Smith, for the sum of ten thousand dollars, and received a deed of conveyance. It is further stated, that complainant expected to obtain peaceable possession of the premises aforesaid; but contrary to this expectation, one Stephen Henderson, of the state of Louisiana, has placed thereon one Edmund Guice, under pretense of having claim to said land, and of having sold the same to one George Salked, and utterly refused to give possession, notwithstanding the sale aforesaid.

It is further stated, that Henderson has instructed Guice to resist by force the surveyor of the public lands, in surveying the tract purchased as aforesaid, and threatens to commit waste thereon by cutting down the timber, and removing or destroying the improvements on the premises, although the said defendants well know the said lands to belong lawfully and of right to the complainant. The bill concludes with a prayer "for an injunction to stay waste." To which bill the defendants filed a general demurrer, upon which issue was taken. At a superior court of chancery for the western district, held on the second Monday of January, 1833, the demurrer was agreed before the chancellor, and after due consideration sustained, and complainant's bill dismissed, with costs. From which decree there was an appeal to this court. The only question submitted to the consideration of the court is, whether the complainant is entitled to an injunction to stay waste, when the defendant is stated to be in possession; and holds over under an adverse claim. We think not, and we are supported in this opinion by all the adjudged cases in England and America.

In *Pittsworth v. Heapton*, 6 Ves. jun., Lord Chancellor Eldon says: "I do not recollect that the court has ever granted an injunction against waste under any such circumstances. I remember perfectly being told from the bench, very early in my life, that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of the court as to the injunction." See, also, *Davis v. Leo*, same authority. So in the case of *Horway v. Howe*, 19 Ves. jun., 153, if the bill contains a statement, admitting even the pretense of a claim on the part of the defendant, the plaintiff will have to go out of court. In the case of *Stone v. Maum*, 4 Johns. Ch. 21, an injunction to stay waste will not be granted when the title of the plaintiff is doubtful, and when the defendant is in possession by an adverse claim. In the case before us, there is a controversy about the right and title to the land in question, as appears by complainant's own showing. When it is alleged in his bill, "he hoped to have obtained quiet and peaceable possession of said lands, according to the acts of congress under the authority of which they were sold, and the usages in like cases. But contrary to this expectation, a certain Stephen Henderson, of the state of Louisiana, has placed thereon one Edmund Guice, under pretense of having claim to such lands, and of having sold the same to one George Salked," thereby directly admitting the adverse claim

of the defendant, who remains in the possession of the premises. Under such circumstances, we cannot do otherwise than affirm the decree of the court below. There was no necessity for the defendant to answer, because the plaintiff has admitted everything necessary to enable him to avail himself of the law upon those facts by way of demurrer. If this was an application for an injunction to stay the hand of a lawless trespasser, the court would still be more circumspect in compelling the plaintiff to show unquestioned evidence of title. The reason of the rule must be obvious. The party complaining could not invoke the aid of the chancellor, unless in a case of irreparable injury, and how could a trespasser do an irreparable injury to lands of complainants? He admits defendant's claims under pretense of title. When in looking over this class of cases I cannot find a precedent until the time of Lord Thurlow, who relaxed the rigor of the rule when irreparable ruin would have followed his refusal, as in *6 Vesey*.

Where plaintiff the proprietor of two adjoining closes, under which were mines, one of them being demised to defendant, who opened a mine upon the one demised to him. This was held to be waste from the priority, and when application was made for an injunction to prevent him from digging in the other close, Lord Thurlow hesitated much, but at last granted the injunction: First, upon the ground of irreparable ruin to the property as a mine; secondly, it was a species of trade; and, thirdly, upon the principle of this court enjoining in matters of trespass, where irreparable damage is the consequence. So it seems if the party has an adequate remedy at law, the court will not grant an injunction unless the application be made under very special circumstances, as in *Stevens v. Buckman*, 1 Johns. Ch. 318. In some cases the court will interfere in simple trespass, although the injury may not be irreparable, in order to prevent multiplicity of suits, such for instance as the quieting of the rights disputed between the lords of manors and their tenants. So, also, the disputes between the tenants of one manor and those of another, for it would be no use that each party should institute his separate action of trespass, since it would only determine his individual right and not settle the controverted point as to all those who may feel themselves interested. If the facts alleged in complainant's bill be in the nature of a tort without irreparable injury, the remedy is at law, and if the tort-feasor receives a benefit from the trespass, an action shall survive against the executor. There, upon general

principles, the chancellor will not interfere, unless this remedy should prove inadequate to afford relief, if it does a court of equity will decree an account to be taken.

HAMPTON, C. J., concurred.

WHEN AN INJUNCTION TO PREVENT A TRESPASS will lie, see note to *Jerome v. Ross*, 11 Am. Dec. 484.

STARK v. MATHER.

[WALKER, 181.]

WRONGFUL ISSUE OF PATENT.—One who receives a patent from the government when another is entitled thereto, may be declared to hold as trustee for such other.

CONFIRMATION OF A SPANISH TITLE, relates back to the original grant.

UNLAWFUL REVOCATION OF GRANT.—Where a grant was arbitrarily revoked, and the property re-granted to another, to whom the title was confirmed, he was decreed to hold as trustee for the first grantee.

BILL in equity. The opinion states the case.

By Court, HAMPTON, C. J. This cause was first instituted in the superior court of law and equity, for Wilkinson county, where the bill was filed on the eighteenth of October, 1813. It was subsequently, at the November term of said court, in 1815, transferred by consent of parties to Adams county, where, at a superior court, November term, 1820, it was transferred to the supreme court on doubts of the judge. At the December term of this court, in 1821, an issue was directed, after previous argument, to the Adam's superior court, to try the question of voluntary abandonment on the part of R. Stark, the ancestor, which issue, at the May term, 1823, of said court, was found for complainants; at the last June term of this court a re-argument was ordered, which we have had the pleasure of witnessing at the present session, conducted with great zeal and ability on both sides. It now devolves upon us to express the opinion which we have formed, after the most careful and patient investigation, but which is yet advanced under the great difficulties of the subject and the discouragement of a dissentient voice among ourselves, which diminishes the confidence with which it is entertained.

The statements of the bill are: That sometime in 1791, Robert Stark, the ancestor, obtained from the governor-general of the province of Louisiana, Evestan Miro, a warrant or

order of survey for two thousand acres of land, square measure, on Bayou Sarah, in the then Natchez district, now in Wilkinson county of this state, which warrant and evidence of actual survey in pursuance thereof, by William Dunbar, deputy surveyor, of said district, and the petition of their said ancestor therefor, are in possession of complainants, ready to be produced. That then said ancestor was put into possession of said tract of land by the proper authorities, conformably to the instructions and requirements contained in said warrant of survey, and complied on his part with all the conditions of cession, continued for several years in possession, made extensive clearings, raised several crops, paid the fees of surveying, and made the necessary advances for perfecting the title by patent. Some time after which settlement, their said ancestor, not satisfied with the situation of said tract, proposed to governor Gayozo to relinquish said tract of land, on express condition that he should receive in exchange therefor from the governor another tract equal in value which he might select. But the said governor, without complying with said conditions, from a personal dislike to their said ancestor, offered his said tract of land to one James Mather, to whom it was immediately afterwards, in 1794, granted, and who took possession of the same, together with farming utensils, and a crop of corn then growing, against which arbitrary conduct of the said governor, and fraudulent practice of said James Mather, their said ancestor protested as unlawful. That the said James Mather, who had a perfect knowledge of the title of said ancestor of complainants to the said tract of land, obtained a grant therefor entirely through the influence of said title and the false and fraudulent representations of William Dunbar, and other officers of the Spanish government, who were urged and excited thereto by the said James Mather. In part evidence whereof, complainants have now in possession a memorandum in the handwriting of the said William Dunbar, at the foot of the original warrant, or order of survey, purporting to be a sale and release of the said two thousand acres to the said William Dunbar, and to have been subscribed by the said ancestor of complainants. The said warrant or order of survey had been in the possession of the said William Dunbar, and when delivered to the said R. Stark, which was after the grant to Mather, it had the memorandum mentioned, but so obliterated, apparently by design, as to be but partially legible.

The bill further states, that according to the laws, usages and

customs of the Spanish government, a Spanish warrant, or order of survey, was considered as equivalent to a complete grant, by which, on the fulfillment of the conditions imposed, a fee-simple passed to the warrantee; and that the government never re-granted the lands so conveyed, unless the same became forfeited to the crown, or by consent of the first grantee, and in latter days the Spanish government was not in the habit of exacting of their grantees many of the conditions annexed to the early grants, and no transfers of rights thus acquired were valid, unless the same were in writing and duly recorded. They deny that their ancestor ever committed any act by which a forfeiture of his right to the said tract of land resulted to the government or ever disposed of the same to any person whatever, or gave his consent, either verbally or in writing, to the proper authorities, to re-grant the same, but that by confederation, etc., the said James Mather obtained and kept possession of the same, and refuses to account for the corn and implements of husbandry acquired therewith. The prayer is for a surrender of the land, its titles, peaceable enjoyment thereof, and for general relief. The answer of James Mather admits the acquisition of the order of survey, its execution, and possession of the ceded premises under it, by ancestor of complainants, but denies his having made either early or extensive improvements thereon, and professes ignorance as to fees paid for survey and moneys advanced for perfection of title. Alleges that sometime in 1792, respondent, desiring to acquire a tract of land in the Natchez district, made application to governor Gayoso, then governor of said district, who informed him that the tract of land now in question was vacant, and that the concession would be made to him on his petitioning therefor. Respondent having understood that said R. Stark, the ancestor of complainants, had resided on said tract for a short time, inquired of the said governor if he had no claim thereto, or expectation of holding it, when the said governor informed respondent that he, the said R. Stark, had abandoned and given up his claim to it. Respondent then inquired of the said R. Stark, being at the house of the governor at that time, if he had any claim to the said tract of land, who answered in the negative, that he had abandoned it, and should quit the country, and that this respondent was at full liberty to apply therefor.

Whereupon defendant petitioned for said tract of land, and obtained an order of survey therefor from the governor of the then province of Louisiana, dated seventh of February, 1793.

and the same was actually surveyed for defendant by William Dunbar, the deputy surveyor, on the twentieth of July, in the same year, and the defendant invested with possession, and about the third of April, 1794, a patent issued for the said premises to respondent, under the seal of the governor of said province, to whom the granting of lands therein pertained. That during the whole of this time, while respondent was perfecting his title as aforesaid, the said R. Stark, the ancestor of complainants, made no claim or pretense of claim to the same; that at the time of purchasing said titles to said tract of land, this respondent had no notice of any other claim thereto, but was assured by the said R. Stark that he had none. On which respondent insists, the same as if it were pleaded. Respondent further answering, denies that when the said R. Stark relinquished and abandoned his claim as aforesaid, he made any reservations or conditions with the governor or commandant of said district of Natchez, by which he was to have other lands in lieu of those thus abandoned, but that said abandonment was for the purpose of quitting the country, which the said R. Stark did do immediately thereafter, without having made any application for other lands in the Spanish dominions; and the respondent believes that when the said R. Stark thus abandoned his land and the Spanish country, the said order or warrant of survey was left in the hands of the said deputy surveyor, and did not again come into possession of the said R. Stark, until his return to the country after a change of government, after which the said R. Stark instituted his action of ejectment against the tenant of respondent, in the district court for the district of Adams, to which action defendant made defense, and permitted the said R. Stark to give all matters in evidence, as well in parol as in deed, touching his said title, and after full examination of both the legal and equitable titles of both parties, a verdict was rendered for defendant. Denies taking possession of the crop, or any other property of said R. Stark; denies all collusion with said William Dunbar, nor does he believe said William Dunbar ever practiced any fraud or designs against the said R. Stark, in relation to said land. That on the twenty-sixth of April, 1803, respondent sold and conveyed said tract of land, in fee-simple, to George Mather, now deceased, for full consideration paid in money and services, by the said George Mather, in his life-time. That this defendant, and said George Mather, in his life-time, and those claiming under him since his death, have been in possession of said premises more

than twenty years, occupying, cultivating and improving the same, on which he insists as if pleaded. Denies all fraud, combination, etc., and the usual prayer for dismissal with costs, etc.

The amended bill charges that George Mather, jun., who is made party defendant, pretends that James Mather, father of said George Mather, conveyed the said premises to George Mather, sen., brother of him, the said James Mather, and he, the said George Mather, sen., devised to him, the said George Mather, jun. But they expressly charge that if such conveyance was made, the same is a fraud of complainants', for they say it was a matter of public notoriety not only in the family of him, the said George Mather, but also in the neighborhood, that the said R. Stark, the ancestor in his life-time, and his heirs since his death, claimed title to the said tract of land, of which the said George Mather, sen., brother of the said James Mather, and the said George Mather, jun., another defendant, had notice before any conveyance or devise, as is pretended to have been made, was made. Prayer as in original bill, and for conveyance from the said George Mather, jun., to the complainants of the said premises, and for general relief.

The plea of George Mather, jun., states that George Mather, sen., was a purchaser for valuable consideration of his brother, James Mather, without notice, and devised said premises to him, the said George Mather, jun., defendant. Complainants' title consists in the petition of their ancestor, Robert Stark, for the land in question, dated twentieth of September, 1791, accompanied by an address from Governor Gayoso to the governor and intendant-general of the province of Louisiana, dated on the first of October, 1791, recommending to his excellency the pretensions of the said Stark, and the warrant or possessory order of survey from the said governor-general to the surveyor-general, Trudeauux, dated the twenty-ninth of December, 1791, under which it is in evidence that the said R. Stark, the ancestor, was invested with possession of the said tract of land, the same being duly laid off and surveyed for his benefit, and that he remained in possession for several years, improving and cultivating the same, having paid the fees for survey and the further fees for the perfection of title. Whatever right to the contested premises were raised by this state of facts in favor of the ancestor, R. Stark, if not subsequently affected, the present complainants succeeded to as heirs, by virtue of that succession now ask relief at the hands of this court. Defendant's

title consists in a warrant of survey for the contested premises in favor of James Mather, dated seventh of February, 1793, survey made in pursuance thereof on the twentieth of July of the same year, the certificate whereof returned into the office of the governor-general of the province of Louisiana, dated second of April, 1794, on which a patent emanated from said office bearing date the third of April, 1794. A deed from James Mather to his brother, George Mather, sen., of the said premises on the consideration expressed of ten thousand dollars, dated twenty-sixth of April, 1803, filed and recorded in the office of the clerk of the county court of Wilkinson, where the land lies, on the thirteenth of November, 1815, and in the register's office, west of Pearl river, on the thirty-first of March, 1804. The will of G. Mather, sen., uncle of G. Mather, jun., the present defendant, bearing date the seventh of November, 1803, containing a bequest of the premises to him, the said defendant, and certificate of confirmation of the board of commissioners, bearing date the twentieth of April, 1806, in favor of the said George Mather, jun., the present defendant, under which defendant and those from whom he derives title have enjoyed long and uninterrupted possession, not, however, acquiesced in by complainants and their ancestor, evidenced by an action of ejectment instituted in the Adams district court by R. Stark, the ancestor, against James Mather, in which verdict was for defendant, and the institution of this suit by complainants, the heirs of the said R. Stark, on the equity side of the superior court of Wilkinson, in 1813.

If the foundation be sound and good, the superstructure of this title, so regular and complete in all its parts, presents a very imposing aspect.

It may be well to dispose of some preliminary points, which though they occupied a distinguished place in the able discussion at the bar, do not present to the court, from the view, which after great reflection they have taken of the merits of this case, matters of much difficulty. Few occasions have elicited greater and happier exertions on the part of the counsel of defendant, than the discussion of the question, how far Spain, at the time of the respective cessions of the matter in controversy, had a right to grant lands lying between the thirty-first degree of north latitude and the mouth of the Yazoo river. We do not, however, consider the discussion of that question as an indispensable measure to the attainment of the ends of justice in the case under consideration. If we did, the argument and

authorities advanced by the counsel, and the very able opinion of the judge of the district court of the United States, to which we have had access, would have their due weight with us. If the matter in controversy was between a patentee of the Spanish government and the government of the United States, the decision of that question would be unavoidable. Admitting in the abstract, that Spain had no such authority, yet the argument is not satisfactory, which considers the acts of the Spanish government void, as to the rights and claims of both parties litigant, and that the first origin of legitimate right, is to be found in the confirmation of Mather's claim by the American board of commissioners, conformably to the provisions and stipulations contained in the articles of agreement and cession between Georgia and the United States. For equity will certainly reflect the gracious complacency which these provisions and stipulations throw over the acts of the Spanish government, by which they are redeemed from the reproach of tort-feasors, so far as to effectuate the results of immutable justice. She will inquire into the fair claims of those who set up pretensions under this act of munificence (if you please), and impart the benefit to him, for whom in good faith it was intended.

Though it be admitted that the finding of the jury is not conclusive upon us in accordance to the principles recognized: 1 Chan. Cas. 506, still on a careful examination of the evidence we are satisfied with the verdict, and shall consider the question of voluntary abandonment as put at rest by it. Where the evidence is contradictory, it is the province of the jury to judge of its weight. The evidence which would lead to a different conclusion to that drawn by the jury, relates mostly to expressions and conduct of R. Stark, the ancestor, after the misunderstanding had occurred between him and governor Gayoso, when his mind was either under the irritation and excitement produced by that event, or discouraged by the impending storm of arbitrary power which it presaged. The evidence should be very conclusive to produce a satisfactory conviction that a man who had at great expense migrated with a large family to this fertile country, and settled and improved a valuable landed property in it, had voluntarily and without any reasonable cause moving him thereto abandoned and forsaken both. As to the question of notice, George Mather, jun., the present defendant, though he stands in relation to him of whom he derives title in the character of a volunteer, yet if his uncle, George Mather, sen., who bequeathed to him the prop-

erty in controversy, was a purchaser thereof for valuable consideration, without notice, it may be admitted, as is laid down in some of the books, that as a volunteer he may protect himself by this equity in his division, and occupy the same favorable attitude of his uncle, a purchaser for valuable consideration without notice. But the evidence of Joseph Vidal, Eleazer Rees, Joseph Williams and George Hart sufficiently proves that George Mather, sen., at the time of the purchase from his brother James, had notice of R. Stark's claim. He, therefore, cannot be considered in the character of a purchaser for valuable consideration, without notice. The consequence is, therefore, that George Mather, jun., the present defendant, cannot have stronger claims, in reference to Stark's rights, to the litigated premises upon the consideration of the court than those of a volunteer, or a purchaser with due notice of this outstanding equity.

As it respects the trial of ejectment in the Adams district court some years since, it is sufficient to remark that the evidence of the presiding judge satisfactorily evinces that though the matter went to a jury, yet that the recovery was had for the defendant chiefly on the ground of his being deemed a superior legal title, or that the title exhibited by the plaintiff was not deemed a paramount legal title sufficient to justify the eviction in that form of action of defendant from the controverted premises. Having disposed of these preliminary points we shall proceed to examine the two principal questions, in our estimation, involved in the present controversy, which we shall consider together in the conclusion.

1. What is the fair construction of the provisions and stipulations contained in the articles of agreement and cession between the United States and Georgia, and the several acts of congress passed in pursuance thereof, and how far such a construction bears on the case before us.

2. What are the powers of a court of chancery to grant relief, such as is sought by the present complainants? By the second clause of the first article in the said stipulations between Georgia and the United States, it is provided, "that all persons, who on the twenty-seventh day of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants, legally and fully executed, prior to that day, by the former British government of West Florida, or by the government of Spain, and in claims by virtue of any actual survey and settlement made under the Georgia Bourbon act. By

virtue of this section the American commissioners gave to the defendant a certificate of confirmation, he having exhibited his perfect Spanish title, and the necessary evidence of actual residence on the said twenty-seventh day of October, 1795. The United States having accepted of the cession upon the conditions hereby imposed, divested themselves of all discretionary power in regard to claims thus protected by the convention of Georgia. As to grants of this description, made either by England or Spain, their authority, so far as respects the vested rights in the grantees, is expressly recognized by Georgia, and the United States, not the abstract creation or origination of right, but the recognition of existing rights, in reference to acts of other governments. By the first section of an act of congress, passed third of March, 1803, it is enacted: "That any person or persons, or the legal representatives of any person or persons, who were resident in the Mississippi territory on the twenty-seventh day of October, 1795, and who had, prior to that day, obtained, either from the British government of West Florida, or from the Spanish government, any warrant or order of survey for lands lying within the said territory, to which the Indian title had been extinguished and which were on that day actually inhabited and cultivated by such person or persons, or for his or their use, shall be confirmed in their claims to such lands in the same manner as if their titles had been completed, if granted as the true head of a family or over the age of twenty-one years." Here again we perceive an obvious reference to the acts of the British and Spanish governments, as the basis of the recognition of rights, of such claims as fall within the provisions of this congressional confirmation of right. Now, who can question that if R. Stark, the ancestor of complainants, had not fled from the gathering storm of incensed power, but had remained in peaceable possession of his improvements, or with his order or warrant of survey in his pocket, a tenant in possession, he had been a resident of the territory on the twenty-seventh of October, 1795, even though he had not received a patent for which he had paid the customary fees of office, yet either that his claim would have been preferred to that of defendant by the board of commissioners, or that would have happened which occurred in the case of Cole's heirs, the government of the United States would have granted a patent on the production of such evidence though the other claim had been preferred by their commissioners? Shall, therefore, the base absence of these parties of necessity and not of choice, be held by

us to defeat a right founded in justice and equity, and which had actually vested in him, and had never in any legitimate way by any competent authority been vacated or annulled. We think not. It would be to make this court the handmaid of oppression, a chancery to consecrate the wrongs and enormities of licentious power.

In the case of *George Winn v. Cole's Heirs*, decided at the adjourned January term, 1823, this court held: "That the possessory order in favor of James Cole to the premises in question, dated sixth of June, 1795, by which said Cole was put into possession, vested in him such a right as could only be defeated by his own act of alienation, voluntary abandonment, or by such an entire failure of the conditions of the grant, or by some act against the government, which could justify in them its confiscation." In regard to the first, there is not in this, as there was not in that case, any pretense set up. In that case, it was not pretended that there was, and in this the jury have expressly found that there was not a voluntary abandonment, and in neither case is it alleged that there were any rebellious or treasonable practices on the part of the grantees, to justify the Spanish government in the revocation or confiscation of its grant or order of possession. But in this case it is not pretended, as it was in that of *Cole's heirs*, that there was a failure of the performance of the conditions of the grant. The court having determined, in that case, that there was not such failure of the conditions, places the two cases substantially, in these features of them, wholly analogous. The language held by the court in that case, in regard to the revocation or confiscation of the first grant, applies, in substance, with equal force to the facts in the present. "That there is no express declaration of the Spanish government that such a confiscation or revocation for good and sufficient causes, therein expressed, was ever made, nor any declaration, unless it be found in the formal expressions as to the possession being vacant, to be met with in the subsequent title, which amounts to nothing more than the language employed in the cession of all unappropriated lands, and by no means import a judicial investigation and decision on the part of the competent authorities of the government, by which the vested rights of one citizen or subject are withdrawn and transferred to another; for it would be presuming too much against the justice of any government to attribute to it the use of no more solemnity in the abduction of a vested right of one of its subjects than it employs in the ordinary transfer of its own unappropriated domain."

In the absence of a record of a judicial or official revocation or confiscation of the grant to R. Stark, the ancestor of complainants, for good causes moving the government thereto such as before stated, viz., failure to fulfill the conditions of the grant, or some act of treasonable or rebellious practices against the government, in case where it is not pretended there was an alienation of right, and the jury has expressly found that there was not a voluntary abandonment of it, the re-granting of the subject-matter of such right to another person, shall be deemed the result of mistake, or if the second grantee had due notice of the prior claim, the procurement of false representations and fraudulent practices on his part, or the effect of lawless power in the governor, unsupported by reason or justice, and not to be upheld by a decree of that tribunal, which hath no help for fraud or oppression; whatever, therefore, may have produced another grant of the same premises, before the first grantee had been legally divested, such a subsequent grant can convey no right or property in the premises to the prejudice of the subsisting rights of the first grantee, and he who occupies the controverted premises by virtue of such a subsequent grant, though he be ushered in under the panoply of a full and complete legal title, and be supported in his possession by the strong arm of power, shall nevertheless, after that domination ceases, be decreed by courts exempted from its influence, to hold and possess as trustee for him so unjustly evicted. Such is the character of defendant, and those from whom he derives title in reference to complainant's ancestor, and this character having attached prior to the date of the articles of agreement and cession between Georgia and the United States, it shall not be varied by any of their provisions, but receive the benefits they confer, to the use of those for whom they stood seized as trustees. Neither do we consider that the removal of R. Stark, the ancestor of complainants, after this character of the trustees, did in the estimation of equity, attach to James Mather, as at all varying the responsibility of said trustee, or as defeating the right of the said R. Stark to succeed to the enjoyment of his property, as early as its restoration should be awarded by a proper tribunal. If the possession of James Mather was, as it certainly was in our estimation, virtually the possession of Robert Stark, the ancestor, then the absence of the latter, on the twenty-seventh day of October, 1795, shall not defeat his claim, we are inclined to think that such would be our opinion even in a case where the contest had been wholly between two citi-

zens, where the weaker with the better right was overborne by the stronger, and under such discouragements, voluntarily left the country, but surely in a case where a man flies from the strong arm of power, he shall not forfeit any right thereby. The power of the courts to scrutinize into the true character of titles, though consecrated by a certificate of confirmation or patent, has not been called in question. For congress having expressly reserved the right of a judicial investigation to those whose claims were repudiated, even against the patentees of government, for valuable pecuniary consideration, cannot be supposed to have withheld it in relation to patentees by courtesy, or such by virtue of a consideration supposed to have passed to a former government. The provisions in the articles of agreement and cession between Georgia and the United States, and in the several acts of congress in relation to this subject, were designed to settle claims between the government, and not to extend to the conflicting claims of individuals which were left for final adjustment to the tribunals of justice. In regard to the present controversy, we have been appealed to for its decision, and are of opinion that justice and equity demand at our hands the effectuation of complainant's rights, so long and so unrighteously usurped. That the patent from the Spanish government to James Mather, and the confirmatory certificate of the American board of commissioners to George Mather, jun., ought in good faith, on the part of the former, and of right on the part of the latter, to have been awarded to R. Stark and his heirs, and that in principle the present is strongly analogous to the case in 1 Serg. & R. 208, where Tilghman, chief justice, speaking of a patent erroneously obtained, says: "The officers of the commonwealth are to give the patent to him who is entitled to it, and if they give it to any other person, that person is no more than a trustee for him who has the right. This is the settled law in our courts, and the courts of the United States adopted the same principle in *Hordekepper's Lessee v. Douglass*."

We are of opinion, that defendant should deliver up the premises to the complainants, and convey to them all his right and title, and pay the costs of suit.

ELLIS, J., concurred.

STOCKTON, J., dissented.

A PATENT IS THE HIGHEST EVIDENCE of the transfer of land from the sovereignty to an individual: *Strong v. Lehmer*, 10 Ohio St. 93; *Stoddard v*

Chambers, 2 How. 234. As a general proposition, a patent is necessary to pass a perfect and consummate title to public lands, with one exception, namely, where an act of congress grants land with words of present grant: 3 Washburn on Real Property, sec. 526. He who has made an entry, and has received a certificate, is vested with the equitable estate in the lands, which becomes a perfect legal estate upon the issuance to him of the patent, the final act by which the government parts with its interest. Prior to the issuance of the patent, the purchaser could sell and convey the land as completely as he can afterwards. The patent is simply better evidence of his right to do so: *Bagnell v. Broderick*, 13 Pet. 430; *Carroll v. Safford*, 3 How. 460; *Frisbie v. Whitney*, 9 Wall. 187; *Hutchings v. Low*, 15 Id. 88; *Dickinson v. Brown*, 9 S. & M. 130; *Sweatt v. Corcoran*, 37 Miss. 516; *Forbes v. Hall*, 34 Ill. 167. Until the patent issues, the legal estate is in the government: *Brownson v. Kukuk*, 3 Dill. 490; *Le Bean v. Armitage*, 40 Mo. 138; and ejectment cannot be maintained upon an entry in a land-office; it will only lie upon a patent: *Hooper v. Scheimer*, 23 How. 235.

A PATENT PERFECT ON ITS FACE cannot be avoided collaterally: *State v. Bachelder*, 5 Minn. 223; *Doggs v. Merced Mining Co.*, 14 Cal. 365; *Sherman v. Buick*, 93 U. S. 209. In *Sharp v. Dittenthaler*, recently decided in the United States circuit court, for the district of Oregon, and reported in 4 P. C. L. J. 31, the plaintiff brought an action at law under a patent issued, pursuant to the Oregon donation act, to a settler and his wife, India, under whom the plaintiff claimed. The defendant held under one Angeline, alleged to be the wife of the settler, and sought to establish that the patent, so far as it stated, that one half the donation inured to India, was false and void. Judge Deady refused to admit evidence in support of this defense, on the ground that it would contradict the patent, and said: "It is not claimed that this patent is * * * void, because issued contrary to law, or on account of any fraud or mistake which appears upon its face. Now it is an elementary principle, that a patent cannot be avoided for matter *dehors* the record, except by a suit in equity, in which the fraud or mistake is directly pleaded: *Mounsey v. Drake*, 10 Johns. 25; *Polk v. Wendal*, 9 Cranch, 98; *Doe v. Wenn*, 11 Wheat. 381; *U. S. v. Stone*, 2 Wall. 535; *French v. Fyan*, 93; U. S. 169; *Moore v. Robbins*, 96 Id. 530. * * * To admit evidence in this action to show that Angeline and not India was such wife, is to contradict the patent upon such point, and to show a mistake therein by matter outside of itself, which we have seen cannot be done in an action at law."

A patent is of itself presumptive evidence, that the previous proceedings have been regular: *Barry v. Gamble*, 8 Mo. 88; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Id. 328; *Winter v. Crommelin*, 18 How. 87; *Dodson v. Cocke*, 3 Am. Dec. 757.

In an action of ejectment the patent is itself evidence of title, which it is incumbent upon the defendant to rebut: *Bagnell v. Broderick*, 13 Pet. 436; *Hill v. Miller*, 36 Mo. 182; *Steiner v. Coxe*, 4 Penn. St. 28. But in such action, the defendant will not be allowed to show that the patent, regular on its face, was obtained by fraud: *Smith v. Winton*, 3 Am. Dec. 755; *Boggs v. Merced Mining Co.*, 14 Cal. 361. The validity is a question exclusively between the sovereignty and the patentee: *Jackson v. Lawton*, 10 Johns. 24; *Field v. Seabury*, 19 How. 332; and individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them: *Boggs v. Merced Mining Co.*, 14 Cal. 361; *Waterman v. Smith*, 13 Id. 419; *Leese v. Clark*, 18 Id. 535. Yet where the patent bears on its face evidence of a want of authority to issue it, it will be declared void if produced

in an action of ejectment: *Alexander v. Greenup*, 4 Am. Dec. 541. Parol evidence is admissible, moreover, to show that the officers have issued a grant for lands forbidden by law to be granted: *Strother v. Cathey*, 3 Am. Dec. 633; or to prove that the officers themselves had no power: *Patterson v. Tatum*, 3 Sawyer, 164; *Sherman v. Buick*, 93 U. S. 209; and, in general, in an action of ejectment, the defendant may attack the patent on the ground that it has been issued without authority, or is against the law, or is manifestly void: *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Id. 328; *Cooper v. Roberts*, 6 McLean, 93; *People v. Livingston*, 8 Barb. 253; *Jackson v. Marsh*, 6 Cow. 281; *Jackson v. Lawton*, 10 Johns. 23.

TO ANNUL A PATENT ABSOLUTELY, the regular tribunal is a court of chancery founded on a proceeding by *scire facias*, or bill, or information: *Jackson v. Lawton*, 6 Am. Dec. 313; *Jackson v. Hart*, Id. 280; *Boggs v. Merced Mining Co.*, 14 Cal. 365; and this question being one between the government and the patentee alone, the proceeding must be taken by the government or some individual in its name. The cases last cited and *Field v. Seabury*, 19 How. 332. But where it is desired to set aside or control the operation of a patent, the remedy is in equity, by a bill having that for its direct end and object: *Norvell v. Camm*, 8 Am. Dec. 742; *Klein v. Argenbright*, 26 Iowa, 493; *State v. Bachelder*, 5 Minn. 223; *Yount v. Howell*, 14 Cal. 463; *Leese v. Clark*, 18 Id. 535; *Doll v. Meador*, 16 Id. 295; *Polk v. Wendal*, 9 Cranch, 87. Chief Justice Field, delivering the opinion of the court in *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363, referring to this method of setting aside a patent, says, the bill in equity "is in the nature of a bill to quiet title, to determine an estate held adversely to him, to remove what would otherwise be a cloud upon his own title; or in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has by mistake or fraud, acquired a title in his own name which he should in equity hold for the benefit of the complainant. The individual claimant must therefore possess a title superior to that of his adversary, and of course to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name." This capacity of the judiciary to inquire into the circumstances of the issuance of a patent and to determine the rights of the litigants is recognized in express terms in the supreme court of the United States. In *Johnson v. Townsley*, 13 Wall. 72, 80, it is said that "there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice and wrong in both judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights. * * * No reason is perceived why the action of the land-office should constitute an exception to this principle." So, also, *Warren v. Van Brundt*, 19 Wall. 646; *Cannon v. White*, 16 La. Ann. 85; *Smith v. Athern*, 34 Cal. 506; *Garland v. Wynn*, 20 How. 8.

As long, however, as the title to the land remains in the United States, and the matter is rightfully before the officers of the land department, the judiciary will not be permitted to interfere either by mandamus or injunction. It is not until the title has passed from the sovereignty and forms no part of the public domain that litigating parties may settle their pretensions by state laws and jurisdictions: *Cannon v. White*, 16 La. Ann. 85. The only remedy for mere errors of judgment upon the weight of evidence in a contested case before the land-officers, is by appeal from one officer to another of the department, and, perhaps, under special circumstances, to the president: *Shepley v. Cowan*, 91 U. S. 340; *Sacramento Savings Bank v. Hynes*, 50 Cal. 195.

A PATENT INURES IN EQUITY TO THE BENEFIT of any one to whom the patentee ought to convey the land for whose use he ought to hold it: 3 Washburn on Real Property, 526; *Hennen v. Wood*, 16 La. Ann. 263. And the complainant in a bill in equity for that purpose may hold the defendant as his trustee when it appears that to the latter the patent has been issued by fraud or mistake, or imposition on the land officers: *Cunningham v. Ashley*, 14 How. 377; *Bernard v. Ashley*, 18 Id. 43; *Garland v. Wynn*, 20 Id. 8; *Lytle v. Arkansas*, 22 Id. 203; *Brush v. Ware*, 15 Pet. 93; or where the officers themselves have been guilty of fraudulent practices: *Shepley v. Cowan*, 91 U. S. 340; or where the patent has issued to the defendant when it should have issued to the complainant: *Johnson v. Towsley*, 13 Wall. 72. This rule has been applied to the case where one obtained the title by fraudulently basing his demand on the habitation and cultivation made by another: *Cannon v. White*, 16 La. Ann. 85; to cases where one swears that he has made an entry for his own use, when the money has been furnished by another: *Franklyn v. McEntyre*, 23 Ill. 91; *Brock v. Savage*, 31 Pa. St. 410; 46 Id. 83; *Stephenson v. Smith*, 7 Mo. 610. While considering cases asserting this principle, Field, J., delivering the court's opinion, in *Stark v. Starrs*, 6 Wall. 402, 419, remarked: "These are only applications of the well established doctrine, that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title."

In *Estrada v. Murphy*, 19 Cal. 272, the court say: "If the confirmee, in presenting his claim, acted as agent, or trustee, or guardian, or in any other fiduciary capacity, a court of equity, upon a proper proceeding, will compel a transfer of the legal title to the principal, *cestui que trust*, ward, or other party equitably entitled to the same, or subject it to the proper trusts in the confirmee's hands. It matters not whether the presentations were made by the confirmee in his own name, in good faith, or with intent to defraud the actual owner of his claim; a court of equity will control the legal title in his hands, so as to protect the just rights of others." Per Currey, C. J., delivering the opinion of the court in *Wilson v. Castro*, 31 Cal. 420, 439, citing, also, *Emeric v. Penniman*, 26 Id. 124, and *Castro v. Hendricks*, 23 How. 441. Where one seeks to hold another as trustee, he must show that he has himself complied with the provisions of the law, or was prevented from so doing, by which an undue advantage was obtained: *Sacramento Savings Bank v. Hynes*, 50 Cal. 195.

A patentee who takes with knowledge of equities existing in favor of third person will acquire the title subject to those equities: *Wilson v. Castro*, 31 Cal. 426; *Strong v. Lehmer*, 10 Ohio St. 93; and will be compelled to convey the legal estate to the third person: *Lindsey v. Haues*, 2 Black, 554; *Stark v. Starrs*, 6 Wall. 419.

MISCONDUCT OF THE LAND OFFICERS.—"It is a well established principle that where an individual in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." *Lytle v. Arkansas*, 9 How. 314, 333. The cases go still further and lay down the rule that if a man is deprived of his right to the land through the misconstruction of the law on the part of the officers of the land department, in consequence of which a patent issues to another, relief will be granted in equity: *Johnson v. Towsley*, 13 Wall. 72; *Samson v. Smiley*, 13 Id. 91; *Warren v. Van Brundt*, 19 Id. 646; *Shepley v. Cowan*, 91 U. S. 330; *Danforth v. Morrical*, 84 Ill. 456. Nor will a court of equity recognize a second patent for the same lands

by the same sovereign and founded on inferior equities. The government stands like any other seller who has given a bond to convey, and afterwards conveys to another: *Arnold v. Grimes*, 2 Iowa, 1. If the register and receiver have decided in favor of a person's right to enter land, and have given him a certificate, he is entitled to a patent. "Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case where the land-office afterwards sets aside this certificate and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and if it has, to give appropriate remedy:" *Johnson v. Townsley*, 13 Wall. 85. Neither the land officers nor the executive can recall or cancel a patent for lands which has been duly issued, delivered and accepted. If the patent ought to be rescinded, on the ground of fraud, or for some other such good reason, the remedy is by bill in equity in the name of the United States. In cases in which the officers of the land department have acted within the scope of their authority in the issuance of a patent, all right to control the title or decide on the right to the title, has passed from the land-office: *Moore v. Robbins*, 96 U. S. 530. The government cannot attain the same end indirectly by a recital in a second patent that there was a mistake in the issuance of a prior patent. The first is conclusive until properly set aside: *Jackson v. Lawton*, 6 Am. Dec. 311.

THAT THE PATENT RELATES back to the inception of the title, to the date of the first act, is asserted in many decisions: *Taylor v. Brown*, 5 Cranch, 234; *McAfee v. Kiern*, 7 S. & M. 780; *Clark v. Hall*, 19 Mich. 356; *Morrill v. Chapman*, 35 Cal. 88; *Smith v. Athern*, 34 Id. 506. In this last citation it is said that the court will look behind the patents, in case of a conflict between two patents from a paramount source, to ascertain which party has the prior equity; and that when this is ascertained it will attach itself to the legal title which by relation takes effect at the time the equity accrued, and thus a junior patent founded on a prior equity will prevail over an elder patent founded on a junior equity.

GRAYSON v. WILLIAMS.

[WALKER, 298.]

DIVIDING ACCOUNT TO GIVE JURISDICTION.—A running account, though consisting of several items, cannot be divided to give a magistrate jurisdiction.

APPEAL. The opinion states the case.

By Court, CHILD, J. This action was originally commenced before a justice of the peace in said county, founded on an account for professional services as attorney and counselor at law, amount, fifty dollars, where an appeal was taken from the judgment of the justice to the said circuit court. On such appeals, by the laws of this state, R. C. p. 8., the trial before the appellate court is *de novo* upon the merits, without regard to the proceedings before the magistrate, and either party can avail

himself of any matter of pleading or evidence although the same were not pleaded or otherwise insisted on in the court below.

The record before us from the circuit court contains a declaration in the usual form with two pleas in bar, non-assumpsit, and payment with replications, issues thereon. There is also a bill of exceptions, which is made part of the record, by which it will appear that the case turned upon a question to the jurisdiction of the magistrate, and which was available in the circuit court, although it had not been pleaded or otherwise insisted on before the justice, upon the ground that the circuit court could derive no jurisdiction by appeal from a justice who himself was acting *coram non judice* and without authority.

This little matter has been a vexed question in our courts since the formation of our state government, both as it regards the jurisdiction of a justice of the peace, and the manner of taking advantage of it, in cases where the plaintiff's demand exceeded fifty dollars, and the plaintiff had given a false credit, or divided his claim for the purpose of reducing it within the jurisdiction of a magistrate.

I am well aware that where a court of special and limited jurisdiction is created by statute, unless enough appears upon the face of the record to give jurisdiction, it would be bad upon demurrer for such a defect; or perhaps the court itself, jealous of its own powers, would, *ex officio*, take notice of the same, and dismiss the cause: 1 Chitty, 428; 1 East, 252. But where the matter is *dehors* the record, I am inclined to the opinion that it may be pleaded or given in evidence on the trial. Perhaps it would be well in this place to settle how far a party plaintiff will be permitted to divide his claim for the purpose of bringing several actions before a magistrate, in cases where the entire demand consists of causes of action which might be joined in one suit in the circuit court, amounting to a sum greater than the limit of a magistrate's jurisdiction. I am clearly of opinion that a running account with a merchant mechanic, doctor, lawyer, or other person, cannot be so divided, although the price of each article should be agreed upon by the parties; because the whole might be considered as one entire transaction, and indivisible; the same rule also applies, for the same reasons, where a great number of small notes are given for one single purchaser or consideration, due at the time of bringing the first suit. But in cases where there is no general dealing—no account of items between the parties—and two or more separate, distinct, and several express contracts exist,

clearly ascertaining the sum due, and for different and several considerations, each for a sum less than fifty dollars, and extending in the whole to a greater amount or sum total, and all due at the time of the commencement of the first suit, I am unable to discern either law or reason to show that the plaintiff cannot proceed before a magistrate on several actions for each, or that a recovery and payment in one should be a bar to the others: Stark. on Ev. 1200.

As it does appear from the record that there was an account for professional services claimed by the plaintiff below, against the defendant, existing at the time of the commencement of this suit, for a greater amount than fifty dollars, and as nothing appears to exempt it from the operation of the rule hereinbefore expressed, I am of opinion that the court below ought to have instructed the jury, as in case of a nonsuit, and entered in judgment accordingly, leaving the party to commence *de novo* before the tribunal possessing jurisdiction.

Judgment reversed and nonsuit entered.

THAT A PARTY MAY WAIVE part of his demand for the purpose of giving jurisdiction to an inferior court is held proper, contrary to the position taken by the principal case in *People v. Marine Court of New York*, 36 Barb. 341; *Hempler v. Schneider*, 17 Mo. 258; *Denny v. Eckelkamp*, 30 Id. 140; *Mallack v. Lare*, 32 Id. 262; *Hapgood v. Doherty*, 8 Gray, 373; *Pate v. Shafer*, 19 Ind. 173; *Litchfield v. Daniels*, 1 Col. T. 268. These cases all say, in substance, that it is not the amount of the plaintiff's claim, but the sum that he actually demands that gives the court jurisdiction.

BEHALY v. HATCH.

[WALKER, 369.]

TENDER.—An offer of money in bags is a legal tender. It is sufficient that the party offered to pay the requisite amount.

WRIT of error. The opinion states the case.

By Court, BLACK, J. We deem it necessary to notice only one error assigned in the case, which arises on the bill of exceptions taken to the opinion of the judge on the subject of tender. It is stated in the bill of exceptions that the jury came into court and requested the court to instruct them what amounted a legal tender; and the court thereupon instructed the jury "that he who made and relied on a tender should count out to the person to whom tendered the exact amount he

designed so to tender; and that although the person should have offered a larger amount in silver in his hand to the person to whom it was payable and tendered, than the actual amount named in the plea, that is not a good tender, unless told in the presence of such person."

An offer of money in bags is a legal tender, and it is the business of the receiver to count it and see that there is enough to satisfy him. No objection was made as to the amount offered by the defendant. It is not necessary to count the exact sum of money down; it is sufficient if the defendant offered to pay the amount, and had sufficient money to do it. Such particularity as was laid down by the judge is not requisite.

TURNER and CAGE, JJ., concurred.

TO A VALID TENDER OF MONEY it is essential that the party produce the money and offered it unconditionally: *Walker v. Brown*, 12 La. An. 266; *Sargent v. Graham*, 5 N. H. 440; *Bakeman v. Pooler*, 15 Wend. 637; *Breed v. Hurd*, 6 Pick. 356; *Draper v. Hill*, 43 Vt. 439; *Story v. Krenson*, 55 Ind. 397; and it may be contained in a bag or purse ready to be counted by the creditor if he choose, provided the sum be the correct amount: Benjamin on Sales, sec. 715. But the actual production of the money is not necessary where the defendant refuses absolutely to receive it: *Hazard v. Loring*, 10 Cush. 267; *Strong v. Blake*, 46 Barb. 227; *Appleton v. Donaldson*, 3 Penn. St. 381. And if the tender is prevented through the contrivance of the party to whom it should be made, it will be excused or be considered equivalent to a tender: *Sands v. Lyon*, 18 Vt. 18; *Thorne v. Mosher*, 5 C. E. Green, 257; *Borden v. Borden*, 4 Am. Dec. 32.

UPON KEEPING A TENDER GOOD, the cases are collected in the note to *Rose v. Brown*, 1 Am. Dec. 24.

THE SUBJECT OF TENDER OF PERSONAL PROPERTY is considered in the note to *Bates v. Bates*, *post*, and to *Barney v. Bliss*, *post*.

AS TO THE TIME WHEN a tender should be made see the note to *Bates v. Bates*, *post*.

SMITH v. NEVITT.

[WALKER, 370.]

LOSS BY FIRE, VENDEE MUST BEAR.—When a contract of sale has been consummated, and the price paid and the property, though ready for delivery, is not removed by the vendee because not convenient for him to do so, he must bear the loss of its destruction by fire.

THE case appears from the opinion

G. W. Smith, for the plaintiff.

S. M. and T. T. Grayson, *contra*.

By Court, CHILD, J. In this case, the article which constitutes the subject-matter of the contract of sale is called a gin stand. The bargain was made between the parties. The price was also agreed upon, and the purchase-money paid. The commodity or thing sold, was in a complete state of preparation for delivery, and required no act of the vendor for that purpose. It not being convenient, however, for the vendee to remove it at that time, it remained in the possession of the vendor, by mutual consent, subject to his use, where it was consumed by fire, without negligence on his part. In such case, the better opinion seems to be that the risk is at the hazard of the vendee, and the loss, if any, must fall upon him; and so are the authorities, as well in books on first principles, as in decided cases.

BATES v. BATES.

[WALKER, 401.]

TENDER OF PERFORMANCE, if no place is fixed, may be made to the person. TENDER OF PROPERTY is not good unless the articles are specifically pointed out, so that their identity can be ascertained.

ASSUMPSIT. The opinion states the case.

By Court, NICHOLSON, J. This was an action of assumpsit, brought by Richard Bates, the defendant in error, founded on a promissory note, dated the nineteenth of October, 1829, and payable on or before the first day of May next following, for ten cows and calves of second quality. To which the general issue was pleaded, with an agreement by counsel that any legal special matter might be given in evidence; after the plaintiff read the note to the jury, the defendant called Jane Bates, and proved by her that some time in the winter, before the note fell due, the defendant and plaintiff were both at the house of witness, at which time and place she heard the defendant say to the plaintiff that he was then ready to deliver the ten cows and calves named in the note that the plaintiff had on him; that plaintiff replied the note was not due, and that he would not receive them until it became due; that defendant said the note was payable on or before the first day of May, and that he was then ready to discharge said note; witness further stated that defendant had in the place where they were, cows and calves enough to discharge his obligation. The defendant further proved by a Mr. Moore, that on the first day of May, when the

note fell due, he was called on by defendant to walk to his lot, and was informed by the defendant that the cows and calves which witness saw in his lot, amounting to eleven, he, the defendant, had driven up to discharge a note that plaintiff held on him on that day.

The question which the court is called on to decide in this case is, whether agreeably to the foregoing statements of facts, this was a good tender in contemplation of law. The general rule is that if no place be appointed for payment or performance, a tender to the person is good; but was there any tender in this case?

The witness states that the defendant told plaintiff he was then ready to discharge his note; and that the defendant had cows and calves sufficient on the place where they were to have done so, but the defendant did not designate the cows and calves; he merely said he was ready to discharge his note. It is laid down in the case of *Newton v. Golbraith*, 5 John. 119, that the declaration of the defendant that he had hay in his barn or in stock, the plaintiff, without ascertaining the amount and value, was not sufficient. It is also stated in the case of *Slingerland v. Morse et al.*, 8 John. 474, that a legal tender and refusal are a complete bar to the suit on the contract; and the plaintiff must resort to the person in whose possession the goods are, and who holds them as his bailee and at his risk. In order, therefore, to make a legal tender in property, the articles ought to be specifically pointed out, they ought to be clearly ascertained in point of identity that the plaintiff might be able to prove them should he be driven to an action for them. We are of opinion, from the facts above stated, that the cows and calves were not sufficiently identified, nor their quality ascertained, to make it a good tender. It is, therefore, the opinion of the court that the judgment of the court below should be affirmed.

All the judges concurred.

TO MAKE A TENDER OF PERSONAL PROPERTY VALID, so as to comply with the contract of sale, it is sufficient as a general rule, in the absence of special terms providing otherwise, that it be offered to the purchaser at the place where it was at the time the contract was made: 2 Kent's Commentaries, sec. 505; 2 Story on Contracts, sec. 1410; *Barr v. Myers*, 3 W. & S. 295. Where the contract is to pay a debt by the delivery of stated articles, the tender of the property, if it is portable, should be made at the creditor's place of business or residence: *Miles v. Roberts*, 34 N. H. 254; *Hall v. Whittier*, 10 R. I. 535. The reason assigned is, that in this instance, the debtor is the actor

and must take the initiative in the performance of the contract. But this rule does not require the debtor to follow the creditor out of the state in order to deliver the goods to him: *Santee v. Santee*, 64 Penn. St. 473; *Howard v. Miner*, 20 Me. 330. If the creditor removing from the state has left an agent to attend his business in the state, it is the duty of the debtor to call upon the agent to appoint a time and place of delivery: *Santee v. Santee*. And in the absence of any such agent, the debtor himself may select the time and place: *Howard v. Miner*.

WHERE THE PLACE IS NOT ASCERTAINED by the terms of the contract, and the time is, the vendor must seek the vendee and tender the goods if they are portable, at his residence or place of business: *Barr v. Myers*, 3 W. & S. 295, citing *Goodwin v. Holbrook*, 4 Wend. 380; *Lobdell v. Hopkins*, 5 Cow. 516; and *Roberts v. Beatty*, 2 Penn. 71. And Sergeant, J., who expressed the opinion of the court in *Barr v. Myers*, after laying down the rule as stated, continues: "I am not aware of any decided case which makes a distinction, where a time is stipulated for the delivery of articles, between a contract of sale and delivery and a contract to pay a debt in certain articles, nor do I perceive the ground of such distinction." The reason here is, also, that the vendor has bound himself to deliver the property and, in order to fulfill his contract, must become the first actor, and must look for the vendee at his residence or place of business. The qualification of the rule, depending upon the character of the articles, is recognized in the cases, and is stated as follows by Bell, J., in *Miles v. Roberts*, 34 N. H. 254: "If the articles are bulky and cumbersome, it is the duty of the debtor to seek the creditor and learn from him where he wishes them to be delivered, and upon the creditor designating a reasonable place; to deliver them at that place: Co. Litt. 210, b; Cro. El. 48; *Currier v. Currier*, 2 N. H. 75; *Flanders v. Lanfear*, 9 Id. 201; *Slingerland v. Moore*, 8 Johns. 474; *Lafurge v. Rickart*, 5 Wend. 187, and cases cited; *Mason v. Briggs*, 16 Mass. 453; *Aldrich v. Albee*, 1 Greenl. 120; *Bean v. Simpson*, 4 Shep. 31; 2 Kent's Com. 507; Story on Contr. 319." So, also, *Deel v. Berry*, 21 Tex. 463. If the creditor cannot be found, or if he refuses to appoint a place, "or which is much the same, to appoint a reasonable place," the debtor may himself select any suitable and reasonable place, and a delivery there, with notice to the creditor if he can be found, will discharge the contract: *Miles v. Roberts*, 34 N. H. 254. Where the time and place are fixed by the terms of the contract, or where the time is so fixed and the place has been determined by subsequent appointment, the creditor must deliver the articles at such time and place or show a readiness to do so, and this without a demand: *Wiggin v. Wiggin*, 43 N. H. 561, 567, citing Co. Litt. 210, b; *Lobdell v. Hopkins*, 7 Cow. 516; *Goodwin v. Holbrook*, 4 Wend. 380; *Aldrich v. Albee*, 1 Greenl. 120; *Birby v. Whitney*, 5 Id. 192; *Bean v. Simpson*, 16 Mo. 49; *White v. Perley*, 15 Id. 110; and *Smith v. Loomis*, 7 Conn. 110.

TIME WHEN TENDER SHOULD BE MADE.—Concerning the time of the day when the tender should be made, the following is laid down in *Croninger v. Crocker*, 62 N. Y. 158, where it was held that a tender of wool after ten o'clock at night was not a good tender. "The rule is that a tender of bulky articles in the performance of an agreement must be seasonably made, so that the person may have an opportunity to examine the articles tendered and see that they are such as they purport to be, and such as he is entitled to demand, before the close of the day on which the delivery is to be made. Whether the tender should be made before sunset may depend upon circum-

stances, and does not appear to have been decided by the courts of this state. But when daylight is required for the proper examination and assortment of the goods tendered, there can be but little doubt that time should be given the tenderer for such examination before sunset and by daylight." The rule with regard to the time of performance, or tendering performance, generally, is thus stated in *Hall v. Whittier*, 10 R. I. 530, 334. "Where a contract is to be performed on a certain day and at a certain place, the legal time of performance is the last convenient hour of the day for transacting the business usually, that is to say, such convenient time before sunset as that the act may be completed by daylight. This rule is established for the convenience of the parties, that neither may be compelled, unnecessarily, to attend during the whole day. Earlier in the day, therefore, neither party can discharge himself in the absence of the other by being present and ready to perform; though if both parties are earlier present, a tender and refusal then will be as effectual as at a later hour: *Wade case*, 5 Co. 114; *Lancashire v. Killingworth*, 12 Mod. 530; S. C., 1 Ld. Raym. 686; *Hammond v. Ouden*, 12 Mod. 421; *Rutland v. Batty*, 2 Str. 777; 1 Plowd. 172, 173; *Tinkler v. Prentice*, 4 Taunt. 555; *Doe v. Paul*, 3 C. & P. 613; *Acocks v. Phillips*, 5 H. & N. 183, and note; *Savory v. Goe*, 3 Wash. 140; *Tiernan v. Napier*, 5 Yerg. 410; *Aldrich v. Albee*, 1 Greenl. 120. A tender however which is made after sunset will be sufficient, if the party to receive is present, but after sunset the absence of either party is not a default: *Startup v. McDonald*, 6 M. & G. 593; *Sweet v. Harding*, 19 Vt. 587. The rule may also be varied by special agreements and usages of business: *Lancashire v. Killingworth*, *supra*, and *Rutland v. Batty*, *sic supra*." The sufficiency of a tender after sundown is admitted in *McClarty v. Gokey*, 31 Iowa, 505, a case, however, of the tender of a sum of money.

WHERE NO TIME IS LIMITED in the contract for the delivery of the articles, they are deliverable on demand, and the demand must be such as will enable the plaintiff to perform according to the terms of his contract: *Russell v. Ormsbee*, 10 Vt. 274; Story on Contr. 1411; *Vance v. Bloomer*, 20 Wend. 196; *Rice v. Churchill*, 2 Denio, 145.

WHEN THE TIME AND PLACE ARE FIXED, a tender then and there is good, although no person is present to receive the articles: *Gilmore v. Holt*, 4 Pick. 258; *Southworth v. Smith*, 7 Cush. 390. And, if the vendor is not present at the time and place, a demand may be made by the vendee of any one there in charge, or a public demand at that place, at a reasonable time, will suffice, when no person can be found: *Rice v. Churchill*, 2 Denio, 145. The vendor, who is ready to deliver the goods at the time and place, will hold them thereafter as bailor for the vendee. *Smith v. Loomis*, 7 Conn. 110, in which case it is said that the following propositions are established in Connecticut: "1. That a debt payable in specific articles may be discharged by a tender of these articles at the proper time and place; 2. That the articles must be set apart and designated, so as to enable the creditor to distinguish them from others; 3. That the property so tendered vests in the creditor, and is at his risk; 4. That a tender may be made in the absence of the creditor."

THE PROPERTY MUST BE DISTINGUISHED from other articles of a similar kind, and must be selected from a larger bulk by the creditor, and the goods designated, in order to render the tender sufficient: *Clark v. Baker*, 11 Met. 186; *Croninger v. Crocker*, 62 N. Y. 151; and *Smith v. Loomis*, 7 Conn. 110.

THE TITLE MUST BE IN THE CREDITOR or vendor, so as to enable him to tender articles unincumbered: *Champion v. Joslyn*, 44 N. Y. 653; *Croninger v. Crocker*, 62 Id. 151.

BIGGAM v. MERRITT.

[WALKER, 430.]

JUDGMENTS, PREFERENCE BETWEEN.—If two judgments appear to have been entered on the same day the court will ascertain which was first entered and award it the preference.

THE case appears from the opinion. Judgments were recovered against the same defendant, in favor of the plaintiffs, in two different actions, on the same day. The question was as to which one should be satisfied first.

By Court, BLACK, J. Motions were made in each of the above-entitled suits to appropriate the money made by the sheriff, of which he has made a special return, each execution contending for preference, which motions were referred to this court by the judge of the circuit court on a statement of facts. The question proposed for consideration is, whether under the act of the legislature of 1824, by which all property, real and personal, is bound from the entering of judgments, the court will consider of the fractional part of a day, and give preference to one judgment over another when they are both entered upon the same day, but the one prior in point of time to the other; it would appear both just and reasonable, when time is necessary to be considered in order to determine the substantial rights of a party, that the court should discard all these fictions of law sometimes necessary to preserve the harmony and symmetry of its proceedings, and consider it in its various divisions. The court will not endure that a mere fiction at law, introduced for the sake of justice, shall work a wrong. The courts in England, as well as those in the United States, have been governed by these principles. In *Johnson v. Smith*, 2 Burr. 950, it was determined that when the substantial rights of a party required that the real time of suing out a *latitat* should be shown, it might be done, notwithstanding the fiction of law which extended the *teste* to the term previous. The point raised in this case was first insisted upon in *Adams v. Dyer*, 8 Johns. 347 [5 Am. Dec. 344], which case was determined on a different principle; but from the principles upon which the court proceed, it is to be inferred, if the fact had been made out by legal proof, the court would have considered the day divided into fractional parts. The same question was afterwards raised in the supreme court of the same state in cases precisely analogous to those before this court, 1 Cowen, 592, in which it was expressly de-

terminated that the court will ascertain the real and true time when judgments are entered, and the lien attaches in favor of that first entered. Priority was then determined in favor of the judgment entered five minutes before the others.

It is unnecessary to determine, in the present case, what would be the effect of a judgment by default, which is made final by our statute, on the adjournment of the court; in both the present cases juries were impaneled, and judgment entered up forthwith on motion.

It appearing by the minutes of the court that the judgment in the case of *T. Biggam v. Merrill* was first entered, it will be entitled to be first satisfied.

All the judges concurred.

CONCERNING JUDGMENTS RENDERED ON THE SAME DAY against the same defendant, it is laid down in *Freeman on Judgments*, sec. 370, "that unless the law provides for fractions of days, all judgments entered on the same day will be regarded as if entered at the same time, and as creating liens equal in point of priority, and entitled to be paid *pro rata* out of the debtor's real estate: *Rockhill v. Hanna*, 4 McL. 555; *Bruce v. Vogel*, 38 Mo. 100; *Mechanics' Bank v. Gorman*, 8 W. & S. 304; *Burney v. Boyett*, 1 How. (Miss.) 39." It is further said, sec. 374: "If two or more judgments, on account of their contemporaneous rendition or docketing, or from any other cause, are equally entitled to precedence as liens on the real estate of the judgment-debtor, this equality may be destroyed in order to give precedence to the lien-holder who first attempts to subject any specific real estate to the payment of his lien. 'The law favors diligent creditors,' and the courts seem to be unanimous, where liens are otherwise equal, in according to him who first takes property in execution the right to be first satisfied out of its proceeds: *Cook v. Dillon*, 9 Iowa, 407; *Waterman v. Haskin*, 11 Johns. 228; *Adams v. Dyer*, 8 Johns. 347; *Bruce v. Vogel*, 38 Mo. 100; *Burney v. Boyett*, 1 How. (Miss.) 39."

The same principle is recognized in *Rockhill v. Hanna*, 15 How. 195.

HEAD v. GERVAIS.

[WALKER, 431.]

POWER OF ATTORNEY AT LAW.—An attorney at law has no authority to assign his client's judgment.

KEEPING ALIVE A PAID JUDGMENT.—If a judgment be paid by a friend of one of the parties, it cannot be kept alive without the consent of the defendant.

OBJECTIONS WAIVED BY DELAY.—After the parties in chancery have, under pleadings framed for that purpose gone into an accounting, it is too late to object that the jurisdiction of the court ought to have been confined to other matters.

BILL in equity. The opinion states the case.

Magee, for the complainants.

By Court, BLACK, J. It appears that the judgment at law, which the complainants, Head and Davis, have enjoined by this bill, was obtained against them by S. D. Gervais, one of the defendants, was paid by Morse, the other defendant, at the instance and request of complainants. This judgment, on being paid by Morse, was assigned to him by the attorney at law of record of said Gervais; Morse claiming to have the benefit of this judgment at law and execution by virtue of this assignment, the first question is, whether it is sufficient in law to vest in him an interest? There can be no doubt, that an attorney at law, as such, has no power to assign a judgment of his client.

Mr. Sharkey, who was the attorney, does not state, in his deposition, that he was specially authorized by Gervais to assign this judgment, but thinks he must have been, or he would not have assigned it. His deposition is very vague and uncertain throughout, and by no means sufficient to establish the fact that he was authorized, as attorney in fact of Gervais. Downs, in his deposition, states that he heard Gervais say that he was willing, under certain restrictions, to let the judgment be assigned to Morse. But his being willing that it should be done, was not doing it; much less does it prove that Mr. Sharkey was authorized to do it as his agent; and this latter fact, Gervais, in his answer, expressly denies.

With respect to this assignment, there is also one thing to be borne in mind, that is, that this was not a purchase of this judgment from Gervais, but the money was advanced by Morse, on the request of complainants, and for their accommodation. Morse went forward as their friend, to pay off this judgment, to save their property from sacrifice by sale, on the faith of a promise made by them to put cotton in his hands, to a sufficient amount to cover, as well this advance, as debts they were owing him on other accounts. This being a payment of this judgment by Morse, as the friend of complainants; under these circumstances, and not a bare contract with Gervais, for the purchase of this judgment against complainants, it would seem necessary in order that Morse should obtain the use of the judgment, and continue the lien under it in his favor, that it should appear not only that Gervais did assign the judgment, but that the defendants consented that it should be assigned to and kept open

by him. Otherwise it could be considered in no other light than a payment of the judgment by complainants, through their agent and friend Morse. The answer of Morse distinctly alleges the fact of consent on the part of complainants to this judgment being assigned to him, but the allegations of the bill are to the contrary, and the oaths of complainants taken before the commissioners, and there is no proof in the cause to show that they gave such consent in any way.

Both of these objections to Morse claiming under this judgment, by this assignment, and to issue an execution on it, for his own benefit, under the circumstances appear to be insurmountable: 1. That there is not satisfactory evidence to show that Sharkey was authorized as attorney in fact, to assign this judgment; 2. It should appear, not only that this judgment was legally assigned, but that complainants consented that it should be assigned.

The result is that the defendant, Morse, is not entitled to any remedy, by execution on this judgment at law, to reimburse him for his advances made, and having attempted to enforce it by an action on this supposed assignment, should have been perpetually enjoined by a decree of the chancellor from attempting further to enforce it. Here it is insisted by the complainant's solicitor, that the decree should stop, that the payment or non-payment of the judgment was the only question before the court, and if the court determine Gervais not to be entitled, they can go no further.

There can be no doubt but that a defendant may, in many cases, when he sets up payment of a judgment obtained in a court of law, go into a court of equity, and by the original bill set up such defense, and have the plaintiff at law perpetually enjoined from further proceedings on such judgment. He may do it more especially, when the facts are complicated and payment disputed, as the court of chancery, in such a case, can afford fuller and more ample relief than a court of law can on motion, or *audita querela*. A bill properly framed might unquestionably be made to embrace that question alone, and this bill might have been so drawn as to have brought that alone in controversy.

The bill of complainants in this case alleges payment and satisfaction of the judgment by this advance of Morse on their account, but does not stop there; it alleges repayment in full to Morse of the money so advanced by him, and states numerous circumstances relative to shipments of cotton, receipts

passed from Morse to complainants, drafts drawn by complainants on New Orleans, going minutely into an account of all the transactions between complainants and defendant, Morse. To this bill defendant has filed a long and explanatory answer, in which the matters of fact stated appear supported fully by the proof. The bill appears to be, in its nature, a general bill to account. The chancellor has ordered an interlocutory decree referring it to commissioners to take and state an account of the matters of charge and discharge mentioned in the bill and answer.

The commissioners, in pursuance of this decree, have reported balances due of different amounts, from each of the defendants respectively. An objection that the chancellor has taken notice of all the allegations of complainants' bill, appears, at this late hour, to come with an especial ill grace; and it will not do for them to say that the chancellor should have noticed some parts of the bill and not others; all obligations relative to transactions which would result in their favor, and exclude those which have resulted in their indebtedness. It would result in much mischief if complainant were permitted to bring this case into court, set it for hearing on certain allegations of the bill and answer, relative to which much proof has been taken, and then, when a balance is found against him on these transactions, which he has himself drawn in controversy, to object to the jurisdiction of the court as to those matters.

The conclusion is that the complainants are properly chargeable with the sum reported by the commissioners to be due from each to the defendant, Morse. It may be proper here to notice an objection made by one of complainants' counsel on account of the apparent earnestness with which it was argued, to any decree being made in favor of Morse against complainant. It was said that there does not appear to have been any indebtedness at the time this bill was filed. The first answer to this objection is that it is one which ought to have been made by way of exception to the report of the commissioners, in allowing the demands of defendant. They have reported certain amounts due the defendant, and this exception goes to the propriety of their determination. But waiving that objection, let us examine the facts as presented by the proofs in the cause.

It appears that on the second of October, 1826, complainant and defendant, Morse, entered into an arrangement, by which complainants drew drafts for the amounts they were severally

indebted at that time to Morse, and were, by agreement, to have placed funds in the hands of the acceptors to meet the drafts at maturity, and in order to have the drafts negotiated. Morse became guarantor to complainants in an obligation given to the acceptors, that complainants would comply with this stipulation. Receipts were then given by Morse to complainants, expressing to be in full when complainants should comply with their undertaking to have funds placed in the hands of the acceptors of the drafts. The complainants failed entirely to comply. Morse was sued on his contract entered into jointly and severally with complainants to the acceptors of these drafts, and judgment was recovered against him. The accounts of Morse were only conditionally settled, and receipts expressed to be in full, only in the event of complainants complying with that condition. Having entirely failed to do so, the original demand revived, and stands in the same situation as though no settlement had taken place. It is a mistake in counsel to say, that Morse should have sued complainants on their contract to have funds placed in the hands of acceptors; for this contract and undertaking was not to Morse, but to the acceptors, in which Morse himself was a joint obligor. It is clear Morse could maintain no action on this instrument. Lane and Armstrong, the acceptors, were the only persons who could sue on it. It is true, that the judgment against Morse was unsatisfied at the time this bill was filed, and that on Morse paying this judgment, on account of his suretyship for complainants, he might have maintained an action for money paid, laid out, and expended for their use; but it is equally clear, that complainants, having entirely failed to comply with the only condition upon which Morse accepted these drafts as payment of his demand, he had a right to proceed on such demands, more especially as he shows that complainants cannot be injured by these drafts, as they are taken up by Morse, and ready to be impounded.

If Morse had brought an action at law against complainants, by laying suitable counts in his declaration on his original demands and counts for money, he might have embraced other demands from whichever source the court might consider them as most properly arising; and it would be very singular, if after complainants filing a bill of such a nature as this, after a reference to commissioners, and an account stated and returned, without exceptions, a court of chancery, to which they have thought proper to resort, on account of its being supposed to

be able to do more competent justice between the parties in this case, would be governed by rules more strict and rigid.

With this view of the subject, I am of opinion that the chancellor erred in decreeing that there was sufficient proof to show that Morse was legally entitled to the benefit of this judgment and execution thereon; and that a perpetual injunction ought have been decreed against his proceeding thereon further.

But in proceeding to render such decree as the court of chancery should have made, I think that complainants, Head and Davis, should be decreed to pay to defendant the amount each was found to be indebted, by the report of commissioners, and that they have execution therefor, and that the decree of the chancellor be, in all other things, affirmed.

CAGE and NICHOLSON, JJ., concurred.

AN ATTORNEY HAS NO AUTHORITY, as such, to assign a judgment recovered in favor of his client: *Clark v. Kingsland*, 1 S. & M. 256; *Wilson v. Wadleigh*, 36 Me. 496; *Mayer v. Blease*, 4 Rich. N. S. 10; *Baldwin v. Merrill*, 8 Humph. 132; and *Maxwell v. Owen*, 7 Coldw. 630, 634, in which case Andrews, J., delivering the opinion of the court, states in express terms: "An attorney has not, by virtue of his general employment as an attorney, and without special authority from his principal, the power to assign a judgment under his charge for collection, or to agree on behalf of his principal that the judgment shall be kept in force, or that execution may issue thereon for the benefit of the indorsers." See, also, *Weeks on Attorneys*, sec. 239.

KEEPING JUDGMENT ALIVE.—Whether a payment by a third person of the amount of the judgment operates as a discharge thereof, or merely as an assignment, so that he will be subrogated to the rights of the judgment-creditor, is a question of intention. If the parties intend to keep the judgment on foot they may do so, proceeding in the name of the plaintiff: *Null v. Moore*, 10 Ired. L. 324. An absolute payment by a third person without any understanding that the judgment is to be assigned, will extinguish it: *Sandford v. McLean*, 3 Pai. Ch. 117. Such also seems to be the law in regard to a payment by a surety against whom, with his principal, a judgment has been obtained: *Barringer v. Boyden*, 7 Jones' L. 187; *Dempey v. Bush*, 18 Ohio St. 376; but see the cases on this point collected in *Brandt on Suretyship*, secs. 270-272.

THE PAYMENT BY A SHERIFF of a judgment, in order to exonerate himself from liability for failing to collect the execution, is held not to work an extinguishment of the judgment in *Heilig v. Lemly*, 74 N. C. 250, where the cases in the different states are cited and commented upon. The court refuse to follow the doctrine prevailing in New York and some other states, and follow the reasoning of *Allen v. Holden*, 2 Mass. 133; S. C., 6 Am. Dec. 146; see, also, the note to 6 Am. Dec. 146; *Freeman on Executions*, sec. 469; and *Herman on Executions*, 205.

MERCER v. STARK.

[WALKER, 451.]

BENEVOLENT INTENTIONS.—Promises founded solely on benevolent intentions will not be specifically enforced.

BILL in equity. The opinion states the case.

McMurrin, for complainant.

D. S. and R. J. Walker, contra.

By Court, NICHOLSON, J. This is a bill to foreclose a mortgage given by defendant to complainant's intestate, to secure the payment of five thousand dollars. The bill has the usual charges and allegations for a foreclosure. The answer of defendant admits the execution of the mortgage, but insists upon offsetting a part of said mortgage by the equity of another transaction. He says that about the time of executing said mortgage, he was hard pressed by sundry executions, amounting to seven thousand dollars; that a tract of land and eight negroes were levied on by virtue of said executions, and B. Farrar, complainant's intestate, agreed to become the purchaser of said real and personal estate, sold for the benefit of defendant; that said Farrar entered into this agreement on account of the friendship and esteem which he held for the said defendant; that said Farrar agreed he would not sell the land for less than eight thousand dollars in cash, and that for the eight slaves, levied as aforesaid, he would allow defendant one hundred and twenty dollars per annum, clear of all expenses, for each of said slaves, and restore the said slaves to defendant when the debt due by the said mortgage, and the debt then about to be contracted, should be paid, etc. He further alleges that Farrar did become the purchaser, and the property was sold at a great sacrifice, under the idea that Farrar was purchasing it for the benefit of the defendant, and prays for an account to be taken, etc. We are inclined to think that however an equity in a different transaction may be set off against a mortgage, yet, in that case, the evidence does not support the allegations of the answer. However friendly and benevolent Farrar might have been towards Stark, a court of equity cannot decree a specific performance of an agreement where there is no consideration or mutuality upon which that agreement is made. Farrar's agent, who bid off the property, knows of no such agreement, but says that the purchase was like any other purchase at sheriff's

sale, and so far from a sacrifice of defendant's property, that Farrar determined to make it bring its value. The testimony of Conner is to the same effect, that Farrar said he would purchase in the property, to prevent its being a sacrifice; and even Carter Beverly, who seems, from his own statements, to have been the repository of Farrar's feelings and sympathies towards Stark, shows no consideration. He says, in answer to the second interrogatory, that Farrar uniformly told him, Beverly, that he brought the property of Stark for the purpose of securing the claim which he had against Stark; and in the answer to the third interrogatory, he says that Farrar said that he and Stark were mutual friends, and his object was to secure what he could for Stark; and throughout the whole of this lengthy deposition, the result of so many confidential communications, there is nothing like a consideration or reciprocity on which these benevolent intentions were based. Admitting, therefore, the testimony of Beverly *in extenso*, it amounts only to conversations in which Stark was not present, or cognizant of, after the sale of the property, and not a particle of evidence to show that Stark ever even assented to the propositions. It was assumed in argument, that had the deceased lived, there would have been no necessity for a suit; that Farrar would, without doubt, have continued to extend his friendship towards Stark; this is not denied. But can a court of equity, after the decease of an individual, carry his benevolent intentions into effect, so far as to decree a specific performance, when those intentions were only produced from the generous feelings of the heart, without any consideration on which to base them? We think not. A decree of foreclosure must therefore be made. The cross-bill and amended cross-bill having been abandoned in the argument, it is not necessary further to notice them than to say they are dismissed.

TURNER and CAGE, JJ., concurred.

CHILD and BLACK, JJ., dissented.

MILES v. RICHARDS.

[WALKER, 477.]

VOLUNTARY CONVEYANCES will not be set aside as fraudulent on the mere allegation that the grantor was largely indebted before and after their execution. Creditors cannot avoid a gift made by their debtor, if it left him with ample means to satisfy their demands.

BILL in equity. The opinion states the case.

By Court, BLACK, J. The complainant does not show by his bill sufficient reason why the voluntary conveyance from R. Fletcher to Glasbourne should be set aside, and be subject to his debt. The bill alleges that R. Fletcher, at the time of his death, was largely indebted for transactions before and after the transfer, and that without the property transferred his estate will be insufficient to pay the debt. This charge, that Fletcher was indebted on account of transactions before and since the transfer, is too vague and uncertain. It might be asked what portion of these transactions was before, and what since the transfer? To this the bill gives no satisfactory answer. Fletcher might have owed a very small sum at the time of executing the conveyance, and afterwards became largely indebted, and then taking what he owed previously and adding it in calculation to what he contracted subsequently, it would make a large amount. The allegation, then, that Fletcher was indebted on account of transactions before and since the transfer, would be borne out by the facts. Can the conjunction of indebtedness be permitted to prevail in the absence of actual fraud? If one being largely indebted make a voluntary transfer of his property, a presumption of fraud arises; or if he make it with a view to future indebtedness, it is actual fraud; but to say that a man who owes a sum of money, inconsiderable when compared with his ability to pay, shall not be permitted to give away any part of his property, however small, would be to infringe on his rights of first importance, and to fetter property with an intolerable clog. If a person thus situated should give away part of his property, the transfer would be good, honest and valid at the time. His creditors could not complain, for he would answer them: I have property left by many times to pay you; that same person might afterwards be unfortunate and become involved. The subsequent creditor could not complain that their debtor had, at some former period, when he owed little or nothing, given away part of his property. Yet, in a bill they could use the same language used in complainant's bill, by adding the subsequent debt to some inconsiderable and insignificant sum due previously to the transfer; they might say their debtor was much involved on account of transactions before and since the transfer. If this was all they could urge, their complaint would not be listened to. This might be thought to be a criticism rather verbal in its character if it were not that it is fully justified by the sub-

sequent allegations of complainant's bill. It is true that complainant states that unless the property is made subject to the claim of creditors of Fletcher, his estate will be insolvent. This may be true, and still Fletcher may have left at his death sufficient assets to pay all his debts. It not only does not affirmatively appear that Fletcher died insolvent, but it negatively appears by the bill itself that he died leaving much property which, it is stated, his executors (who were exempted from giving security by the will) have wasted. That charge in the bill is as follows: "Your orator also states that at the death of the said Richard Fletcher, he was possessed of a large estate, real and personal, which immediately thereafter went into the hands of his representatives. Your orator states that the said executor and executrix, though bound by principles of honesty and their duty as representatives of the said Richard Fletcher, deceased, did not give any account, nor return any inventory of said estate from the time of their appointment, as aforesaid, until the year 1826, from which return, made in the year 1826 by the executor, Robert R. Fletcher, it appears that the said estate is insolvent."

This being the truth, Richard Fletcher not only, it is to be presumed, had sufficient property left to pay all his debts after making the conveyance of the property in question, but left at his death a large real and personal property which his executors have wasted. The only complaint there is, is against the executors, who have wasted the estate coming to their hands, and for this the complainant has his full remedy against them. The fact of their not having been required by the will to give security will not make any difference. Complainant might have appeared before the orphans' court, and on a proper showing compelled them to do so, notwithstanding the will. The executors alone are to blame for want of sufficient assets, and it would appear singular indeed to say that the validity of the transfer should be made to depend, not on the fact of fraud, real or implied, nor on the indebtedness or solvency of Fletcher, at the time of making the transfer, but on the prudent or imprudent management of his executors since his death. For these reasons it appears, as was before remarked, if complainant has any just cause of complaint, it is against the executors of R. Fletcher, and he cannot make his property liable for his claim. This view is decisive of the case, but it may be well to notice the two points raised and discussed at the bar. It was contended that the complainant filed his bill prematurely, not

having first obtained a judgment, and that he cannot help his case by filing a supplemental bill, stating that he obtained judgment since.

It is true in general, that a creditor cannot file such a bill as this to set aside a conveyance until he has obtained a judgment at law; for until then, he has no lien, but to this rule there may be exceptions, where the aid of a court of chancery is necessary to make the legal right of the party available to him. In this case Richards had an execution against Glasbourne, and was about to sell this property. If he had been permitted to do so, the property would have passed into the hands of purchasers, for valuable consideration, who would, without notice, have held the property discharged of complainant's demand. It was, therefore, proper to stay Richard's execution until the rights of the parties could be fairly investigated, and the bill was properly filed in the nature of one *quia timet*, and complainant subsequently obtaining judgment was sufficient; nor can Richards be considered with any degree of propriety as standing in the light of purchaser for valuable consideration. He did not credit Glasbourne on the faith of his having this property. One Poultney was his original debtor, against whom he sued out an attachment, and got judgment against Glasbourne as garnishee. There are many points of difference between the ground upon which Richards stands, and that upon which a *bona fide* purchaser for valuable consideration would present himself before the court.

See *Pauling v. Speed*, *ante*, 269, and *note*.

FORD v. FORD.

[WALKER, 506.]

NEW TRIAL IN EQUITY.—A court of equity will not set aside a judgment at law, and grant a new trial, if the complainant has a just defense on the merits which he, without fault on his part, was, by accident, prevented from making.

BILL for a new trial. The opinion states the case.

Grayson, for the complainant.

Smith, Weber and Marsh, *contra*.

By Court, TURNER, C. J. Two grounds are laid by the complainant, Freeman Ford, in his bill by which he seeks a new

trial at law: 1. That the verdict at law obtained against him by Celia Ford is fraudulent, unjust, and oppressive; 2. That the complainant was prevented from making his defense at law by accident, unmixed with negligence. The account filed is novel on its face. It is very unusual to see a suit on an account for boarding slave. They are generally considered an article of profit to the owner. The item for negro hire is also a singular one. It would seem that Mrs. Ford hired to Freeman Ford a valuable negro man for about nine years in succession, and no credit given for any part of the hire. How these things may turn out on a trial before a jury, we know not. When the jury shall hear the witnesses on both sides, they will be able to decide between the parties.

We think the complainant is entitled to a new trial at law, inasmuch as it appears to the court that he has not been heard on the former trial; that he has a good defense, and was prevented from making it, and from moving for a new trial, by accident, being absent from the state at the time, and his counsel likewise; that he did not know of the absence of his counsel until after the judgment at law, and his attorney testifies that he was prevented from getting to court in consequence of the ice in the Ohio river, he having gone on business from the state with the intention of returning, and attending the trial of this cause.

The decree of the chancellor is affirmed.

NICHOLSON, MONTGOMERY, SMITH, and HUSTON, JJ., concur.

HAMILTON v. COOPER.

[WALKER, 542.]

THE STATUTE OF LIMITATIONS OF ANOTHER STATE does not bar a recovery in the courts of this state, except where it has operated to confer a title to property while situate in such state.

SUIT BY LEGATEE.—An executor in Kentucky may authorize a legatee to sue in this state.

TERMS OF GRANTING A CONTINUANCE.—A court may, as terms for granting a continuance, require the applicant to consent to the reading of an informal deposition.

DETINUE. The opinion states the case.

By Court, HUSTON, J. Lucy Ann Hamilton, by her next friend, brought her action of detinue against Maybion Cooper,

to recover from him certain negro slaves. The defendant pleaded first the general issue, to which there is a joinder, and then five other pleas, to which the plaintiff demurred. The court below sustained the demurrer, and upon trial of the general issue, the plaintiff had a verdict and judgment in her favor. The case is brought into this court by appeal, and the appellant has assigned for error the judgment of the court in sustaining the demurrer to his five pleas, and also various opinions and charges of the court, as contained and set forth in a bill of exceptions filed in the cause.

Our attention is first called to the pleas and demurrers. The second and sixth are pleas of the statute of limitations of this state; and the question as to the propriety of them as legal bars to the plaintiff's recovery is not now for the first time presented for consideration to this court. But the subject has been heretofore decided, after labored investigation, that there is no statute of limitations of this state which can be set up as a bar to recovery in our courts, until after the termination of the different periods which have been adopted as limitations of actions by the last act of our legislature on this subject. However much we may regret the consequences resulting from injudicious legislation, we are not prepared to array ourselves in opposition to those functionaries of government who have a constitutional right to make law. The court below, therefore, did not err in sustaining the demurrer of the plaintiff to these pleas.

The third and fourth pleas setting forth and relying upon the statute of limitations of Kentucky for defense. The question presented upon the demurrer to these pleas has also been adjudicated on by this tribunal, and it has been determined that the courts of this state must confine themselves to the limitations provided by our own statutes, and cannot regard those of any other state in the Union. The decision is authorized and sanctioned by the decisions of most of the superior courts of the different states, and is, we conceive, founded upon reason and sound policy.

The fifth is a plea of the statute of limitations of Kentucky, and concluding with an averment that by the operation of the statute the defendants acquired title to the property in controversy. Upon the first presentation of this plea we were inclined to think it was not materially variant from the two preceding pleas, and must fall under the same rule of decision. But upon a full examination of authorities we became con-

vinced that the court erred in sustaining the demurrer to this plea. It does not come within the scope of our powers or duties to examine into the law of other states or nations for the purpose of either approving or condemning the various modes which they have adopted for the purpose of conferring title to the property over which their laws operate. It is alone competent for us to inquire into the fact whether title has or has not been given, and to shape our decisions in accordance with the laws of the state or nation from which property may be removed, and declare the title to be in such person or persons as have acquired right under said laws. By repeated decisions of the supreme court of the United States, the principle has been established that the statute laws of the state must furnish the rule of decision in that court so far as they comport with the constitution of the United States in all cases arising within the respective states, and that a fixed and received construction of their statute laws in their own courts makes, in fact, a part of the statute law of the country. Viewing this opinion of the supreme court as based in sound reason we have been led into an inquiry into the propriety of the averment of title in said plea, and the construction which the statute of limitations has received in the courts of Kentucky. In 5 *Littell*, 281, we discover that the court of appeals of Kentucky, in deciding on the statute, have determined that a party remaining in the adverse possession of slaves for five years thereby becomes invested, in virtue of the statute aforesaid, with such right as to enable him to recover them of their former proprietor, or any other person who may afterwards obtain the possession. That the statute not only bars the remedy, but takes away the legal right. This decision of the courts of Kentucky is in conformity to the decisions of the courts of Virginia on her own statute, worded in a manner similar to the Kentucky statute; and in 5 *Cranch*, 358, and 11 *Wheat*. 361, the decisions of these courts have the high sanction of the supreme court of the United States; and in the case reported in the last author it is expressly decided that the right acquired by virtue of the act of limitations of Virginia may be set up as a defense by the vendee of the possessor to an action brought against him in Tennessee by a third person. We therefore think that it was competent for the defendant to plead as he did in his said fifth plea, and that the demurrer, as to this plea, should have been overruled. We might here close this opinion, but we judge it best to notice some others of the assignments of errors for the direction of the court below on the trial of the cause.

1. With respect to the right of the legatee to sue. By the will of the testator, the legatee had an inchoate title to the slaves in controversy, so far as the deceased had any right to confer; and this title required only the assent of the executor to become complete; we are of opinion that it was proper for the executor in Kentucky to give that assent, and having done so, either expressly or impliedly, to prove the same.

2. An objection was taken to the deposition of Faith being read on the trial, in the absence of the usual affidavit. Upon an inspection of the record, we are satisfied that the taking and reading of said deposition was a condition upon which a continuance of the cause was granted to defendant; and we do not doubt the power of the court, upon granting continuances, to lay the party applying under terms, and having done so, we do not conceive the court erred. We have noticed no error in the proceedings in this cause, except the one above specified; but for that the judgment below must be reversed, and the cause sent back for proceedings to be had in conformity to this opinion.

TURNER, NICHOLSON, MONTGOMERY, and SMITH, JJ., concur.

THE STATUTE OF LIMITATIONS OF THE STATE where the action is brought must govern, upon the principle that the *lex fori* prevails in questions concerning the remedy: *Nash v. Tupper*, 2 Am. Dec. 197, and note; *Pearrall v. Dwight*, 3 Id. 35; *Ruggles v. Keeler*, Id. 482; *Graves v. Graves*, 4 Id. 697; *Aston v. Morgan*, 5 Id. 733.

THE RIGHTS OF LEGATEES depend upon the law of the country where the testator had his domicile at the time of his death: *Dances v. Boylston*, 6 Am. Dec. 72.

LYNN v. GRIDLEY.

[WALKER, 548.]

AN EXECUTION LIEN is not a right in the property itself, but a right to levy upon the property, to the exclusion of interests subsequently acquired.

SALE UNDER JUNIOR EXECUTION, when a senior writ is in the officer's hands it passes the title free of the elder lien, but the proceeds of the sale must first be applied on the writ having priority.

INJUNCTION, EFFECT ON LIENS.—When an elder execution is suspended by an injunction, its lien is not destroyed thereby, and a sale under a junior writ passes title, subject to its being divested by a sale under the elder lien when the injunction is removed.

APPEAL. The opinion states the case.

By Court, MONTGOMERY, J. Robert A. Lynn recovered a

judgment against Christopher H. Kyle, for five thousand and thirty-three dollars and thirty-four cents, at May term, 1823, of Adams circuit court, on which he sued out execution, returnable at November term, 1823, which execution was levied on a house and lot in the town of Natchez, but there was no sale, for want of time. In June, 1824, Kyle filed a bill in chancery, and obtained an injunction staying all further proceedings on the part of Lynn to enforce satisfaction of his judgment. The suit in chancery was finally dismissed by this court, and the injunction dissolved. December term, 1830, Kyle having died in the mean time, a *scire facias* was issued, returnable at May term, 1831, of Adams circuit court, at which term Lynn's judgment at law was revived.

John E. Hunter recovered a judgment against Christopher H. Kyle, for two thousand dollars, at the November term, 1828, of Adams circuit court, which was decided by a *scire facias* against Kyle's executors at the November term, 1829. A *pluries fieri facias* issued thereon, returnable at May term, 1831, on which the sheriff returned that he had levied on certain slaves, and sold them on the third of January, 1831, for one thousand two hundred and twenty-five dollars, which money he had ready to pay over, by order of the court. He further returned that he had levied on and sold a certain slave for three hundred and thirteen dollars, on the seventeenth of January, 1831. The payment of these sums was demanded shortly after the day of sale, by the plaintiff's attorney, but was refused by the sheriff.

It was proved that the slaves on which Hunter's execution was levied were the property of C. H. Kyle at the time Lynn's execution was in the sheriff's hands, in 1825. Robert A. Lynn made this motion against the sheriff for a judgment for the whole sum made on and by virtue of Hunter's execution, to be appropriated to the satisfaction of his judgment against Kyle's executors, and the court below directed that Hunter was entitled to the money, and overruled the motion; from which decision the plaintiff appealed to this court.

At common law, it was the duty of the sheriff to return all money levied under execution into the court from which the writ emanated; and our statute has altered the common law so far as to require him to pay the money over to the plaintiff in execution. It is often embarrassing to the sheriff to decide between conflicting claimants to money in his hands, where there have been at the same time several executions against the same person, and not sufficient levied to satisfy all. To remedy

or obviate this difficulty, another statute gives the right of preference to the execution first delivered to the sheriff; and to prevent disputes and uncertainty as to which has precedence, requires the sheriff to indorse on every execution the date he received it; and when two executions against the same defendant are handed to him on the same day, to note that which he first received. Under this statute, it is clearly the duty of the sheriff to levy that execution first which is first received, and proceed to make the money and pay it over to the plaintiff in execution, unless notice is given him that another person claimed the money by virtue of some other legal right; in which case, it is the safest and best course to return the money to court, to be there appropriated by order of court; for the sheriff has no discretion, by the common law, or under our statutes, but must pay the money to the plaintiff in the execution on which it was made. The court, when the money is under its control, has a judicial discretion, and will often appropriate the money to the payment of a different judgment.

An execution when handed to the sheriff becomes a general lien on all the defendant's property. But we do not understand that this general lien constitutes of itself a property or right in the property itself, it only confers a right to levy on the property to the exclusion of other adverse interests subsequently acquired, and when the levy is actually made, the title relates back to the time of the execution in the sheriff's hands, so as to cut out intermediate incumbrances. Subject to this, the debtor has full power to sell; his title is not divested or transferred by the judgment or execution unexecuted to the judgment-creditor. It may be levied on by any other execution-creditor, and the purchaser under such junior execution will hold it against every other person except the creditor in the elder execution, and even against him until he consummates his title by a levy on the property itself.

In that event, the prior levy of the junior execution is as to the senior execution void, and the purchaser loses all right under it. If a debtor should sell the property, an execution-creditor cannot follow the proceeds in the hands of the vendor or vendee, or claim it in the hands of the latter, and there is certainly as little reason for following it in the hands of an execution-creditor. The only remedy of the execution-creditor is against the property itself, by making that a specific title which was before a general lien. And he can only claim the proceeds of the property when it has been sold on his own execution,

and ought to be applied to its satisfaction, except where both executions are in the sheriff's hands at the same time, then a sale under the junior execution defeats the lien of the elder, on the presumption that the elder has been satisfied, or it would have been first levied and satisfied. Under such circumstances, and when the elder execution-creditor has been guilty of no improper delay or neglect, the court will, on motion, order the money made on a junior execution to be appropriated to the satisfaction of the elder. But when the operative energy of an execution has been suspended by an injunction, a sale under a junior execution does not affect the lien acquired by such elder execution, but the property in the hands of any person remains liable to a levy when the injunction is removed; therefore Lynn has no right to this money under his execution, which only amounted to a general lien on the property of Kyle, except that property levied on, by which the lien was thus far rendered specific.

The motion made by Lynn against the sheriff could not be sustained on another ground. The sheriff is only liable to this summary and extraordinary action by reason of his official relations to the court, and a duty he owes to the party in that official relation, and courts cannot properly listen to complaints against the sheriff from those to whom the sheriff owes no official duty, the non-performance of which might be a subject of just complaint.

Lynn could not, under the circumstances of his case, have required of the sheriff the performance of any official duty in relation to his claims against Kyle. Indeed, he was expressly and legally stayed from all further proceedings by injunction, consequently, the sheriff was under no legal liability to obey any of his commands, or of others connected with him, in relation to the proceeds of a statute under an execution to which Lynn was not a party. When the money was returned into court, which was very properly done in this instance, and no receiver appointed, but the sheriff suffered to retain it, he must be regarded in the light of the receiver in all further proceedings in relation thereto, and is not liable to an action from any quarter until the court has directed him to whom it shall be paid. The motion should have been for a rule against Hunter, to show cause why the money, in court, by virtue of a levy and sale under the execution in his favor, should not be appropriated to the satisfaction of the execution in favor of Lynn.

The judgment of the court below affirmed.

SALE UNDER JUNIOR WRIT.—"There are some very important differences between the operation of a lien by execution and that of a lien by judgment or mortgage. A judgment or mortgage lien cannot be displaced by a sale made under any junior lien. The purchaser, at the sale under the junior lien, acquires a title which may be divested by a subsequent sale under an elder lien. With sales made under execution the rule is different. If a sheriff have two or more writs in his hands it is his duty to apply the proceeds to the writ having the elder lien. He may however levy and sell under the junior writ. If he does so the purchaser acquires a title to the property sold, free from the lien of all the other writs: *Jones v. Judkins*, 4 Dev. & B. 454; *Lambert v. Paulding*, 18 Johns. 311; *Rogers v. Dickey*, 1 Gilm. 636; *Marsh v. Lawrence*, 4 Cow. 461; *Rowe v. Richardson*, 5 Barb. 385; *Isler v. Moore*, 67 N. C. 74; *Woodley v. Gilliam*, 67 Id. 237; *Samuel v. Duke*, 3 M. & W. 622; 6 D. P. C. 536; 1 H. & N. 127. In such an event the plaintiff under whose junior writ the levy and sale were made, is not entitled to the proceeds of the sale. On the contrary, it is the duty of the sheriff to apply these proceeds to the several writs that may be in his hands, according to their priority as liens. A sale when made by the officer is not for the benefit of the particular writ under which it is made, but for the benefit of all the writs in his hands, according to their respective priorities. The purchaser, at the sale need not concern himself about the priorities of the writs nor the distribution of the proceeds. The officer on the other hand must be attentive to these matters. For though he may have sold under a junior writ, if he pays the money to the plaintiff therein, he may afterwards be compelled to pay it on the writ properly entitled thereto: *Jones v. Judkins*, 4 Dev. & B. 454; *Green v. Johnson*, 2 Hawks, 309; *Jones v. Atherton*, 7 Taunt. 56; *Drewe v. Laimson*, 11 Ad. & El. 537; *Sawle v. Paynter*, 1 D. & R. 307; *Furman v. Christie*, 3 Rich. 1; *Rogers v. Dickey*, 1 Gilm. 636; *Kirk v. Vonberg*, 34 Ill. 440; *Huger v. Dawson*, 3 Rich. 328; *Peck v. Tiffany*, 2 N. Y. 451; *Marshall v. McLean*, 3 G. Greene, 363; *Million v. Commonwealth*, 1 B. Mon. 311; *Russell v. Gibbs*, 5 Cow. 390; *Rowe v. Richardson*, 5 Barb. 385; *Kennon v. Ficklin*, 6 B. Mon. 415; *Smallcomb v. Cross*, 1 Ld. Raym. 251. *Contra: Smallcorn v. Lond*, Comb. 428;" *Freeman on Executions*, sec. 196.

THE EFFECT OF AN INJUNCTION upon an execution and the conflict between the cases is considered in *Freeman on Executions*, secs. 202, and 271.

DECISIONS
IN THE
CONSTITUTIONAL COURT
OF
SOUTH CAROLINA.

STATE v. COMMISSIONERS OF ROADS.

[1 MILL, 53.]

- PROHIBITION, WRIT OF.—A prohibition is commonly defined to be a writ issuing out of a superior court, directed to the judge and parties of an inferior court, commanding them to cease from the prosecution of a suit, because of want of jurisdiction over the suit or some collateral matter therein; but the writ may be directed to persons whose functions have little or nothing of a judicial nature.
- WRITS OF PROHIBITION, MANDAMUS, QUO WARRANTO, INDICAVIT, AND WASTE, contrasted and explained.
- ISSUES IN PROHIBITION should be submitted to a jury.

MOTION for prohibition. The opinion states the case.

Keating L. Simons, for the motion.

Richardson, attorney-general, *contra*.

By Court,* CHEVES, J. On the fourteenth of April, 1814, the commissioners of the roads for Christ Church parish, on the application of Dr. A. F. Toomer:

“Resolved, That Dr. Jervey, John White, and R. T. Morrison, be a committee to establish an old road through Captain Barksdale's plantation, for the benefit of Dr. A. V. Toomer.” And on the fifth of August, 1816, they agreed to the following preamble and resolve: “Whereas Dr. A. V. Toomer, having complained to this board that Captain Thomas Barksdale, by frequently extending his fields, has turned him so far out of his way to the public road as to render it highly inconvenient for

*The judges of the constitutional court, at the time of the original publication of these decisions, were J. F. Grimke, E. M. Bay, Ab. Nott, Richard Gantt, David Johnson, Langdon Cheves, and J. S. Richardson.

him to visit his neighbors, or pursue his public or private business. Therefore,

"Resolved, That the committee formerly appointed be, and they are hereby required to examine the acts of the legislature, authorizing the commissioners to lay out roads, etc., and report to this board at their next meeting." And on the eighth of October, 1816, they agreed to the following resolve:

"Resolved, That the old road, leading from Dr. Toomer's to the broad road, be re-established, and that Captain Barksdale be required to open and clear the same on or before the first day of January next, and that the secretary be and he is hereby required to communicate to Captain Barksdale the resolution of the board."

In consequence of these resolutions, Mr. Barksdale filed a suggestion in the court of sessions for Charlestown district, alleging, among other things, that the road in question was not a road laid out by the commissioners of the public roads, but one established by his ancestors for their private convenience, and used by all other persons by the courtesy of his ancestors and himself; that it passed through his fields; that to continue it open, would be greatly injurious to him, and of little benefit to the public; that there existed a nearer and better road to the great high road to Charlestown; and that the closing of the road through his plantation would only increase the distance to other parts of the parish a quarter of a mile and a little more.

The facts were controverted by the commissioners of the roads, and much contradictory testimony by affidavits was introduced on both sides. On the suggestion and testimony recited, Mr. Barksdale obtained a rule on the commissioners of the roads, to show cause why a prohibition should not issue against them. Whereupon, in January term last, Mr. Justice Grimke presiding, the circuit court ordered "the rule to be discharged, unless the constitutional court should be of opinion that the proceeding by prohibition is the regular proceeding, in which case the prohibition is granted, subject to the revision of the court, on the legality and merits of the case." From this order, Mr. Barksdale appealed to the constitutional court; and we are now to consider: 1. Whether this court has power to grant a prohibition against the commissioners; 2. Whether, if it have the power, it ought to grant it, under the circumstances of the case.

1. On the first question the counsel concerned in the case

have concurred, or at least their difference of opinion was so inconsiderable that I have been unable to discover where it lay. They concurred in opinion that the court had power to grant the prohibition. Notwithstanding this agreement of adverse counsel, it seems the authority of the court has been doubted both at the bar and on the bench. The immediate grounds, it is believed, on which doubts have been entertained, and which probably sustained the determination of the judge who presided in the circuit court, is, that the books say a prohibition is a writ issuing out of the superior courts, "directed to the judge and parties of an inferior court, commanding them to cease from the prosecution of a suit, upon a suggestion that either the cause originally, or some collateral matter therein, does not belong to that jurisdiction, but to the cognizance of some other court:" 3 Bl. Com. 112; and this is certainly the language used almost invariably in the books. Indeed, in one it is said, "It is now most usually taken for a writ which lieth for one who is impleaded in the court christian for a cause belonging to the temporal jurisdiction: Jacob's Law Dict., tit. Prohib., 5 vol. 316, who cites Cowell; and hence it is inferred that the writ of prohibition can only be directed to a court, or, at most, to a body or person exercising some judicial function. The accuracy of this opinion may, however, be reasonably disputed. While the principles in which the writ appears to have originated seem to prove that it may issue in other cases, precedents are not wanting to show that it has actually issued in such cases. It is said "the reason of prohibitions in general is, that they preserve the right of the king's crown and court, and the quiet of the subject:" 5 Bacon's Abr., tit Prohibitions, p. 647. And one general ground of prohibitions is, that though the subject-matter of suit is within the proper jurisdiction of an inferior tribunal, yet that in some collateral or incidental matter it is proceeding contrary to the common law, or some statutory provision. Thus it would seem, if we pursue these principles, that the courts have authority by this proceeding to supervise the execution of the laws, not merely by keeping inferior tribunals within their proper jurisdiction, but also by enforcing a correct execution of the laws, as well the common as the statute law. To the generality of this rule there will, of course, be exceptions pointed out by the nature and object of this proceeding. If, then, the authority of these courts be thus extensive, and such be the objects of this proceeding, what reason can there be to limit its operation merely to the regulation of in-

ferior courts? Why should it not extend to other public functionaries who are charged with the execution of the laws, and to corporate bodies whose existence and whose privileges are an emanation of the sovereign authority?

Accordingly, we do find the writ of prohibition directed to persons, whose character and functions had little or nothing of a judicial nature in them. Thus, prohibition has been a common remedy to restrain the excess or abuse of visitatorial authority in cases of eleemosynary corporations: Woodeson, 1 vol., 472, 473, 479, 483, 484. There is, it is true, in the duty of the visitors of these institutions, a power to determine in some cases, on the rights of individuals, in relation to the corporation of which they are the visitors, but they do this more in the character of private trustees, than as public judges. They are appointed by the founders, or their authority results to them as the heirs of the founders: 1 Woodeson, 474.

It is impossible to imagine a tribunal less resembling those which have been usually and properly denominated courts, than would be the forum, if so we may be permitted to speak, of a visitor of one of these institutions. Less of the judicial characters, or a more shadowy resemblance of judicial functions, cannot be conceived to exist, yet they are usually restrained by proceedings in prohibition, when they exceed or abuse their authority.

From this example alone, and the cases which establish it are numerous, it will appear that prohibitions are not exclusively directed to courts, and that, if judicial functions in those to whom they are directed be necessary at all, as their foundation, they need not be very extensive, or very strongly marked. But, I am of opinion, that in our habit of thinking, on this subject, we have mistaken the derivative for the original. The origin of this proceeding, as we have seen from the authorities quoted, was to secure the sovereign rights, and preserve the public quiet; it was an emanative of the great executive authority of the king, delegated to his courts, and particularly to the king's bench: 1 Bl. Com. 481-482; one of his prerogative writs, necessary to perfect the administration of his justice, and the control of subordinate functionaries and authorities. By the writ of *mandamus* he commanded what ought to be done, and by the writ of prohibition he forbade what ought not to be done, in cases where the general authority was not denied, or not intended to be resumed. The writ of *quo warranto*, on the other hand, was designed to restrain and punish an original usurpation, or to

seize again into the hands of the crown the franchise, or authority, in controversy, because it had been forfeited. It is not intended to say, that the writ of *quo warranto* may not be used to try the validity of a particular franchise, or authority, at the instance of an individual, where the attorney-general shall clothe the proceeding with the authority of the state; but it will, nevertheless, not be an adequate remedy for the citizen, if it were for no other reason than that he will hold it at the will of the attorney-general. Besides, as the object of a *quo warranto* is always the destruction of the franchise, or authority, it will not embrace a case where such a judgment ought not to be pronounced; as, for example, where there has been an actual, but an unintentional excess of a chartered privilege, the judgment would not surely be, that it should be seized; yet the individual would be entitled to relief. Again, where a by-law should be unquestionably correct in its terms and provisions, but should be erroneously applied or executed by the subordinate officers of the corporation, there could not be a judgment of forfeiture, but the individual aggrieved would be entitled to a remedy.

Though the writ of *quo warranto* may sometimes supply a private remedy, it was designed for a public prosecution, and will not, in practice, be found to supersede the utility or necessity of the writ of prohibition. From this remark will be excepted cases under the statute 9 Anne, c. 20, where the writ of *quo warranto* was granted expressly, and is peculiarly proper to afford private relief; it being thus evident that the proceeding by prohibition in principle is not confined to the restraint of inferior judicial tribunals, let us see whether there are not precedents to the same effect. In Fitzherbert's *Natura Brevium*, p. 21, it is said, that tenant by fealty and certain rent shall, in the case there stated, have the writ of *ne injuste vexes* directed to the lord, commanding him not to distrain for other services than of right he ought to do; and it is said that "this writ is in itself a prohibition to the lord;" and, again, that "the process in this writ is attachment, prohibition," etc.; and, though it be called the writ of *ne injuste vexes*, it probably received this name because it was sued out of the chancery as a special writ, at a time when original writs to suit each particular case were obtained with almost as much facility as pleadings are now adapted to particular cases. The origin which Fitzherbert assigns to it proves this; he says: "This writ is founded upon the statute of Magna Charta, c. 10, which

willeth that no man be distrained to do greater service for a knight's fee, nor for any other freehold, than is therefore due." If a like foundation for the application of the writ of prohibition be desired, it will be found in many cases in the second section of the ninth article of the constitution of this state, though it is obvious that this provision of Magna Charta did no more than give a specification to the right of the subject, and did not confer the authority of the court to grant it, which existed before under its general powers.

In Fitzherbert's Nat. Brev., p. 70, it is said: "A person who is sued in the spiritual court may purchase a writ, which is called *indicavit*; which writ is a prohibition," etc. This last authority is cited merely to show the special names which writs of the same nature often assumed as they happened to be adapted to particular cases. So in the writ of waste, at the common law, Fitzherbert's Nat. Brev. 126, those who committed waste were punishable by prohibition and attachment. In the case of *Jefferson v. The Bishop of Durham*, 1 Bos. & P. 120, 121, Chief Justice Eyre says: "At common law the proceeding in waste was by writ of prohibition from the court of chancery, which was considered as the foundation of a suit between the party suffering by the waste, and the party committing it. If that writ was obeyed, the ends of justice were answered; but if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of attachment out of chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of the writ shows the nature of it. It was the original writ of attachment which was, and is, the foundation of all proceedings in prohibition."

Thus we see very clearly that proceedings in prohibitions were applicable to other cases than those in which inferior judicial tribunals were to be restrained. But notwithstanding these authorities, Fitzherbert, Nat. Brev., title Prohibition, like the authorities who have followed him, speaks of this writ only as a writ directed to inferior judicial tribunals. We must, then, consider the writ of prohibition, originally and peculiarly so called in the nomenclature of the chancery, as distinguished from other like writs, and from other proceedings by prohibition. In this way the authorities may be reconciled and made intelligible; and we will be authorized to apply the writ according to the principles and commensurately with the purposes for which it appears to have been designed. Writs of waste and

writs of *ne injuste vexes*, and other like writs, in which the proceedings were by prohibition, have, indeed, long since ceased in our practice; and these examples, as precedents in point, would be absurd and ridiculous; nor can we find a writ of prohibition issuing from the *officina brevium*, directed to commissioners of roads. But it is the peculiar and admirable property of the common law, that it authorizes its dispensers to frame their judgments upon the analogy of cases and principles to the new and continually varying circumstances, and to the present interests and conveniences of the country. We should lose the spirit, and enjoy nothing but the black letter of the common law, if, under the circumstances of our country, so entirely different from England, at any period, we should not allow ourselves to apply its remedies and its process with some little variation.

The English courts themselves have done this on the very subject we are considering, for we should in vain seek in the ancient repositories of writs for a prohibition, in some of the cases which the practice of our own times has furnished. This proceeding, in modern times, seems to have fallen into disuse in controversies between individuals, as in cases of waste and the like; and its use, on the other hand, has been extended to cases of public functionaries and corporate bodies, as we have seen by the examples quoted; and it would seem is applicable to all such cases where the object is not the destruction of the authority or franchise controverted. Now, to apply this reasoning and these authorities to the case before us.

The commissioners of the roads are public functionaries, invested with judicial powers. They decide between citizen and citizen, in relation to the freehold and transfer, without compensation, at their discretion, the property of individuals to the uses of the public. They cite parties before them, hear witnesses, give judgments, and enforce their judgments by high penalties. They seem to be much more clearly and properly objects of these proceedings than visitors of eleemosynary corporations; and I am quite satisfied that the proceeding by prohibition is a proper proceeding in this case.

2. The second question depends principally on the fact, whether this be an old road which was originally laid out by the commissioners of roads. The authority under which the commissioners in this case have acted, is the thirteenth section of the act, entitled "an act to alter and amend the act respecting the highroads and bridges," etc.: Pub. Laws, 446. On this

question of fact there is much contradictory testimony, on which the court would find it difficult to decide; and it is a question peculiarly proper for the decision of a jury of the vicinage. I am, therefore, of the opinion that the plaintiff should declare in prohibition in order that the question may be submitted to a jury. A majority of my brethren at least, as to the points decided, concur in this opinion; the judgment of the court, therefore, is, that the order of the circuit court be reversed, that the rule for a prohibition be made absolute, and that the plaintiff do declare in prohibition: 1 Saund. 136, note 1.

BAY, J. In this case I differ from my brethren, whose opinions have just been delivered, on one point, and one point only, namely: that of sending the case to a jury to determine whether the road which has been obstructed was an ancient highway or not. It appears to me that the act of 1788, commonly called the road act, gives this power expressly to the commission; the sixth clause of the act declares that the commissioners, when appointed, shall form a board of commissioners for their respective parishes and districts; shall meet twice a year, and shall have the power and authority, and are hereby required by law to lay out, make, and keep in repair all such high-roads, private paths, bridges, causeways, and water-courses, as have been or shall be established by law, or as they shall judge necessary, in their several parishes and districts. Here is a full, complete, and absolute power given to the commissioners over the roads in their respective parishes and districts. The high-roads of our country are formed or created in two ways: 1. Either by prescription or long use; 2. Or by the express order of the board for that purpose; in both cases they have equal power over them, and are bound to keep them, and are bound to keep them open and in repair. Whether a road has been in use for a great number of years as an ancient highway, they are as fully competent to determine by the examination of witnesses, or otherwise by their own view, as any other body of men whatever; being men of the parish or district; and probably born in it, they are better qualified to determine upon the subject than any other body of men. At any rate, the law has vested the power in them, and I am not disposed to take it out of their hands to send it to another tribunal. Highly as I respect the trial by jury in most cases, I think the power is in better hands. The commissioners are generally the most respectable men in the parish or district. They are chosen by the landholders of the country, who have a deep and permanent interest in it;

whereas juries are drawn promiscuously from every part of the country, and are drawn from all classes. It might so happen that not one man of Christ Church parish might be drawn upon the jury. Besides, the mode of sending it to the jury will not only create a delay of probably some years, but may be productive of expense. On the other hand, the decisions of the board of commissioners is final and conclusive, and attended neither with expense nor delay. For these reasons I am against sending the case to the jury, and am of opinion the motion for the prohibition should be dismissed.

PROHIBITION, WHEN IT LIES.—To ascertain the appropriate functions of the writ of prohibition, and the class of cases to which it is applicable, it is necessary to recur to the definition of the writ. Blackstone defines it as a writ “directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court:” 3 Bl. Com. 112; and Bouvier substantially copies this definition: 2 Bouv. Law Dict. *voc.* “Prohibition.” Wharton’s definition is: “A writ to forbid any court to proceed in any cause there depending, on the suggestion that the cognizance thereof belongs not to such court. It is a remedy provided by the common law against the encroachment of jurisdiction:” Whart. Law Dict. *voc.* “Prohibition.” Mr. High says it “may be defined as an extraordinary judicial writ, issuing out of a court of superior jurisdiction, and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested:” High on Ex. Leg. Rem. sec. 762. These definitions agree in two things: 1. That the writ lies only to an inferior court; 2. That it lies only for a usurpation or unlawful exercise of jurisdiction. It is not to be denied, however, that this writ has been held to lie to tribunals and persons that were not strictly speaking courts; as in the principal case. Perhaps, therefore, the definition given by Mr. Justice Allen in *Thomson v. Tracy*, 60 N. Y. 31, is more nearly conformable to actual practice in the use of this proceeding. He says: “A writ of prohibition is to prevent the exercise by a tribunal possessing judicial powers of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance.” And yet even this definition seems scarcely comprehensive enough to include all the cases in which the writ has been allowed. Thus it was held in *Chambers v. Jennings*, 2 Salk. 553, that the writ would issue to prohibit a suit for libel in a pretended “court of honor.” It would seem, therefore, not to be necessary that the tribunal to which the writ issues should actually possess any judicial power. It is enough if it is attempting to exercise such power in a particular case without lawful authority. But there are cases which hold that properly speaking the writ can only issue to a court: *Norton v. Dowling*, 46 How. Pr. 7. It is at least certain that to call this powerful writ into action, there must be an attempted unlawful exercise of judicial power.

LIES ONLY AGAINST JUDICIAL ACTION.—It results from the very nature of the writ, as already indicated, that it lies only in case of the unlawful ex-

exercise of judicial functions. Acts of a mere ministerial, administrative, or executive character do not fall within its province: *Ex parte Braudlacht*, 2 Hill, 367; *Norton v. Dowling*, 46 How. Pr. 7; *Low v. Crown Point Mining Co.*, 2 Nev. 75; *State v. Justices*, 41 Mo. 44; *State v. Gary*, 33 Wis. 93. "At common law it seems to be the office of a writ of prohibition to prevent courts from going beyond their jurisdiction. * * * It is seldom if ever granted to restrain the proceedings of other bodies or officers. But whether it is ever issued to another body or officer or not, it is clear that it is only issued to restrain the exercise of judicial powers:" *Home Ins. Co. v. Flint*, 13 Minn. 244; see, also, *Dayton v. Paine*, Id. 493. Chief Justice Dixon states the doctrine still more strongly in *State v. Gary*, 33 Wis. 93, where he says: "It (the writ of prohibition) does not issue to restrain the acts of either executive or administrative officers, but only those of a court or other inferior tribunal engaged in the exercise of some judicial power, and that not merely in a manner not authorized by law, but it must also be in defiance of law, or without any legal authority whatever for that purpose." Hence where a county attorney, acting under a statute, certifies to the state treasurer that in his opinion an insurance company does not possess sufficient capital or assets, and is not complying with the law in other respects, this being a ministerial and not a judicial act will not be restrained by prohibition: *Home Ins. Co. v. Flint*, 13 Minn. 244. So issuing an execution from an inferior court, after a certiorari from a superior tribunal, has been held not to be a judicial act subject to prohibition: *Ex parte Braudlacht*, 2 Hill, 367. And the appointment and removal of clerks by the board of police justices of New York have been held not to be judicial acts which could be prohibited: *Norton v. Dowling*, 46 How. Pr. 7. On the other hand it was decided in *Sweet v. Hulbert*, 51 Barb. 312, that the selection by a county judge of commissioners to carry into effect the provisions of an act to authorize a town to issue bonds to aid in the construction of a railroad was a judicial act as it involved discretion in making such selection, and that the act under which the selection was to be made being unconstitutional, a writ of prohibition ought to go. The removal of a county seat by the county court is a mere ministerial or administrative act not subject to prohibition: *State v. Justices*, 41 Mo. 44; *Ex parte Blackburn*, 5 Ark. 21. And the writ does not lie against a state auditor to prevent him from proceeding by distress, under the statute, against a defaulting tax collector and his sureties for the duties of the auditor in such a case are "executive and ministerial, and not judicial:" *Casby v. Thompson*, 42 Mo. 133. So it does not lie to a corporation to forbid the exercise of a mere naked statute power ministerial in its nature: *Matter of Mt. Morris Square*, 2 Hill, 14.

TO WHOM ISSUED.—Although as is shown above, it is often said that this writ is appropriate only to the case of an inferior court exceeding its jurisdiction, still in practice it is held to lie against other tribunals and persons usurping judicial powers not lawfully belonging to such tribunals and persons, or exercising rightful judicial powers in cases not warranted by law. Thus in South Carolina, it has been held in a number of cases, that this writ lies against road commissioners to prevent the imposition and collection of fines for road work in cases where the law does not authorize such fine: *Harrington v. Commissioners*, 2 McCord, 400; *Lynah v. Commissioners*, Harper, 336; *Price v. Commissioners*, 3 Hill. 314.

So, in the same state, this writ has been frequently held to be the appropriate remedy against tax-collectors to prevent the collection of an illegal tax. But it is conceded by the courts so holding that this use of the writ is not

warranted by the English precedents. Says O'Neill, J., in *Burger v. Carter*, 1 McMull, 410: "It has, however, been objected by the attorney-general in his argument here, that the writ of prohibition did not lie to prohibit the enforcement of a tax execution. I concede that if we were obliged to resort for authority, in this respect, to English precedents, we could not sustain this proceeding. For, according to them, the writ of prohibition only lies to prohibit the enforcement of the judgment of an inferior jurisdiction, where it has proceeded without jurisdiction, or where, having jurisdiction, it has exceeded it. But in this state it has had a wider operation. For the want of a better remedy it has been allowed to restrain the enforcement of tax executions. How this practice began it is difficult as well as unimportant to ascertain. It may be that it was allowed on the notion that a tax-collector, although a ministerial officer, exercised a sort of judicial power in deciding that a person who denied his liability to pay a tax, should notwithstanding pay it, and in issuing an execution to enforce that decision." This remedy against the collection of an illegal tax has been abolished now by statute in South Carolina: *State v. County Treasurer*, 4 S. C. 520.

In some cases in other states, also this writ has been allowed to go against the tax-collector to restrain the collection of an illegal tax. Thus, in *People v. Works*, 7 Wend. 486, it was held that the writ would lie to restrain the collection of a tax assessed by a town-meeting to pay for improving property not belonging to the town. But in *People v. Supervisors*, 1 Hill, 195, it was held that a tax-collector, being a mere ministerial officer, was not subject to prohibition. Bronson, J., delivering the opinion, said: "A writ of prohibition does not lie to a ministerial officer to stay the execution of process in his hands. It is directed to a court in which some action or legal proceeding is pending, and to the party who prosecutes the suit, and commands the one not to hold and the other not to follow the plea." It is the general rule that where a board of supervisors or other proper tribunal has jurisdiction to levy a tax, prohibition will not go to restrain its collection: *People v. Supervisors of Kern County*, 47 Cal. 81; *Clayton v. Heidelberg*, 17 Miss. (9 S. & M.) 623. In Georgia it is provided by statute that neither prohibition, injunction, nor any other preventive remedy shall be awarded by the courts against the collection of a state tax: *Cody v. Lennard*, 45 Ga. 85. The party objecting must pay the tax and afterwards bring his action to recover it. In Kentucky it is held that at common law prohibition is not the proper remedy for testing the legality of a tax; but it was provided otherwise by statute as to the city of Louisville: *Talbot v. Dent*, 9 B. Mon. 526.

A town council, or municipal court, is a proper subject for prohibition when it attempts to impose a fine in a case, or to an amount, beyond its jurisdiction: *McKee v. Town Council*, Rice (S. C.), 24; *Zylstra v. Charleston*, 1 Bay, 382. But in *Mealing v. City Council*, Dud. (Ga.) 221, it was held, that "so long as the city council confines itself within the limits of the charter to mere police regulations under its own ordinances, it cannot be considered a court subject to prohibition. It might be otherwise, should it undertake to adjudge and administer the laws of the state, and to usurp a jurisdiction not belonging to it."

A court-martial exceeding its jurisdiction may be restrained by prohibition: *Washburn v. Phillips*, 2 Met. 296; *State v. Judge*, 20 La. An. 239; *State v. Hopkins*, 1 Dud. (S. C.) 101. The writ has been held proper also where unqualified persons sit in a court on the trial of a felony, there being no other remedy: *State v. Hudnal*, 2 Nott & McC. 419. So it lies against a judge to prevent his presiding in a court organized under an unconstitutional statute: *Ex parte Roundtree*, 51 Ala. 42.

It seems that under the judiciary act of 1789, the writ lies from the supreme court of the United States to the district courts only in cases of admiralty or maritime jurisdiction: *Ex parte Christy*, 3 How. U. S. 292; *Ex parte Easton*, 95 U. S. 68; S. C., 5 Cent. L. J. 169. In *Ex parte Warmouth*, 17 Wall. 64, it was held that prohibition would not issue to restrain a circuit court from exercising jurisdiction under the act of May 31, 1870, to enforce the right of citizens to vote; but that appeal was the proper remedy.

The issuance of the writ to the parties to a suit or proceeding is merely incidental to the prohibition laid upon the court. It cannot issue to the parties independently of the court, or to mere private persons, not attempting to exercise judicial power. Therefore, where a writ of prohibition was in fact issued, commanding certain persons to abstain from acting as executors of an estate, it was held that they were not thereby restrained from prosecuting a suit in equity as such executors: *Thomson v. Tracy*, 60 N. Y. 31. One party to a contest for an office cannot by prohibition restrain his competitor, who is the *de facto* officer, from performing the duties of the office: *State v. Allen*, 2 Ired. 183. And the writ does not lie against the governor of the state: *Greir v. Taylor*, 4 McCord, 206.

THE UNLAWFUL ASSUMPTION OF JURISDICTION, either of the entire cause or subject-matter or of something collateral or incidental thereto, is the criterion by which to determine whether prohibition is the proper remedy. Upon this point the cases are almost unanimous: *State v. Whyte*, 2 Nott & McC. 174; *Moses v. Mitchell*, 2 Bail. S. C. 225; *McKee v. Town Council*, Rice, S. C. 24; *State v. Simons*, 2 Spears, S. C. 761; *Baldwin v. Cooley*, 1 S. C. 256; *Ex parte Smith*, 23 Ala. 94; *Ex parte Greene & Graham*, 29 Id. 52; *Ex parte Smith*, 34 Id. 455; *Ex parte Hill*, 38 Id. 429; *Ex parte Blackburn*, 5 Ark. 21; *Hanger v. Keating*, 26 Id. 51; *Reese v. Lawless*, 4 Bibb, 394; *Arnold v. Shields*, 5 Dana, 18; *State v. Judge*, 14 La. An. 504; *State v. Third District Court*, 16 Id. 185; *State v. Judge of Fifth District Court*, 21 Id. 113; *State v. Judge*, 20 Id. 239; *Washburn v. Phillips*, 2 Met. 296; *Thomas v. Mead*, 36 Mo. 232; *Howard v. Pierce*, 38 Id. 296; *Casby v. Thompson*, 42 Id. 133; *State v. Price*, 8 N. J. L. (3 Halst.) 358; *People v. Court of Common Pleas*, 43 Barb. 278; *Board of Commissioners v. Spiller*, 13 Ind. 235; *State v. Judge*, 11 Wis. 50; *Pringle v. Child*, Moore, 780; *Martin v. Archbishop of Canterbury*, And. 258; *Edward's case*, 13 Co. 9; *People v. Whitney*, 47 Cal. 584. Thus the writ lies to restrain a county court from going beyond its jurisdiction summarily to eject the trustees of a church from their possession of the same: *Howard v. Pierce*, 38 Mo. 296. So it lies to prohibit a county court from hearing appeals cognizable only in the circuit court: *Reese v. Lawless*, 4 Bibb, 394. So, to prohibit an inferior court from proceeding in a case after it has been divested of jurisdiction by an appeal: *State v. Judge of Fifth District Court*, 21 La. An. 113. But not where an insufficient appeal bond has been filed: *State v. Judge of Fourth District Court*, 22 La. An. 115. Nor where the appeal is merely from an order overruling a motion for a change of venue: *People v. Whitney*, 47 Cal. 584. So the writ lies where the amount in controversy is beyond the jurisdiction of the inferior court which undertakes to try the cause; even where the plaintiff splits up his demand to bring it within the jurisdiction of the court: *Hudson v. Lowry*, 2 Va. Cas. 42. Or where the plaintiff, for the same purpose, writes a receipt on the note sued on, for the excess over the amount of which the court has jurisdiction, for this is an attempt to give jurisdiction by a fraud: *Ramsay v. Court of Wardens*, 2 Bay, 180. But in *People v. Marine Court*, 36 Barb. 341, it was held that where the amount

was beyond the jurisdiction of the court, the plaintiff might remit the excess. So it lies against a city council imposing a fine of one hundred pounds for a violation of a city ordinance: *Zylstra v. Charleston*, 1 Bay, 382. So where the council undertakes, without jurisdiction, to levy a fine upon the exhibitor of a certain show: *McKee v. Town Council*, Rice, S. C. 24. The writ lies also to prohibit an inferior court from undertaking to enjoin the judges of the supreme court from taking their own records out of the possession of their clerk: *Thomas v. Mead*, 36 Mo. 232. Under the confederate states government it was held that a state court had no jurisdiction to release a conscript in the confederate service on habeas corpus, for an alleged exemption, and that the issuance of a writ of habeas corpus for any such purpose would be restrained by prohibition: *Ex parte Hill*, 38 Ala. 429. And even where the court has jurisdiction it may be prohibited from the unlawful exercise of judicial power in a collateral matter: *Quimbo Appo v. People*, 20 N. Y. 531; *Sweet v. Hulbert*, 51 Barb. 312.

MERE ERRORS AND IRREGULARITIES, where the cause or proceeding is within the jurisdiction of the tribunal, are not subject to prohibition: *McDonald v. Elfe*, 1 Nott & McC. 501; *State v. Wakely*, 2 Id. 410; *Leonard's case*, 3 Rich. S. C. 111; *Cooper v. Stocker*, 9 Id. 292; *State v. Columbia etc. R. R. Co.*, 1 S. C. 46; *Arnold v. Shields*, 5 Dana, 18; *People v. Seward*, 7 Wend. 518; *People v. Marine Court*, 36 Barb. 341; *Buskirk v. Judge of Circuit Court*, 7 W. Va. 91; *Toft v. Rayner*, 57 Eng. C. L. 162. Where the general scope and purpose of the action is within the jurisdiction of the court or other tribunal, any error or overstepping of its authority in a part of its judgment will not be restrained by this writ: *People v. Court of Common Pleas*, 43 Barb. 278. That is to say, where there is authority to do the act, but the manner of doing it is improper, the writ will not lie: *Ex parte Smith*, 23 Ala. 94; for it is no part of its office to correct, or prevent errors: *Dayton v. Paine*, 13 Minn. 493. If the court or tribunal has jurisdiction the writ cannot go. Indeed it is held that even *prima facie* jurisdiction will bar this remedy: *State v. Judge of Superior District Court*, 29 La. An. 360.

ABSENCE OF ALL OTHER REMEDY in the ordinary course of the law is another requisite to the issuance of this writ. In this particular the rule is the same as to this proceeding as in the case of other extraordinary remedies, whether legal or equitable. If the injury of which the petitioner complains may be remedied on appeal or certiorari, or by any of the other ordinary methods practiced in courts of justice, he cannot have this writ: *Commissioners v. Spüler*, 13 Ind. 235; *Ex parte Smith*, 34 Ala. 455; *Kemp v. Ventulett*, 58 Ga. 419; *State v. Judge of La Crosse*, 11 Wis. 50; *State v. Braun*, 31 Id. 600; *People v. Clute*, 42 How. Pr. 157; *Sasseen v. Hammond*, 18 B. Mon. 673. This writ is not to be permitted to usurp the functions of a writ of error, appeal, or other ordinary remedy: *Supervisors v. Wingfield*, 27 Grat. 329. The writ does not lie, therefore, to prevent a second trial for the same offense, for the party may avail himself of that objection by pleading his former conviction or acquittal in the court below, and if the plea is disallowed the error will be corrected in the appellate court: *State v. Braun*, 31 Wis. 600. But it may be otherwise where there is no appeal: *Ex parte Brown*, 2 Bailey, S. C. 323. For a long time it was the practice in South Carolina to allow a prohibition to go against courts of magistrates and freeholders, in cases of error, in convicting slaves of capital offenses, where those courts had jurisdiction. This remedy was permitted in those cases, however, solely on the ground of necessity, because there was no appeal, and no other method of correcting errors which might lead to the most shocking consequences: *State*

v. *Ridgell*, 2 Bailey, 560. This was afterwards remedied by the legislature, an appeal being allowed by statute in 1833, and then this use of the writ was abandoned: *State v. Nathan*, 4 Rich. 513.

WHERE PROHIBITION WOULD BE INEFFECTUAL it will be disallowed, as where the act is already done: *United States v. Hoffman*, 4 Wall. 158; or where if the act were performed it would be void and could not affect the rights of the party: *Barnes v. Gottschalk*, 3 Mo. App. 222. And in order that the issuance of the writ may not be premature or useless, it must appear that the court or tribunal has taken some step towards doing the act to be prohibited. Mere apprehension of danger will not do: *Prignitz v. Fischer*, 4 Minn. 366; *Mealing v. City Council*, Dud. (Ga.) 221; *Ex parte Greene & Graham*, 29 Ala. 52.

PROHIBITION AFTER JUDGMENT, LIES WHEN.—Ordinarily, prohibition does not lie after judgment in the inferior court to prevent its execution, because the judicial determination which it is the office of the writ to prohibit, is then accomplished, and all that remains is merely ministerial: *Ex parte Braudlacht*, 2 Hill, (N. Y.) 367. But where it appears on the face of the proceedings that the court had not jurisdiction, the writ may be allowed as well after, as before judgment: *Hutson v. Lowry*, 2 Va. Cas. 42; *West v. Ferguson*, 16 Grat. 270; *Ingersoll v. Buchanan*, 1 W. Va. 181; High on Ex. Leg. Rem., sec. 774.

RELIEF MUST FIRST BE SOUGHT BELOW.—This is a rule which is very generally applied, and in some states is always insisted upon as a condition precedent. The party ought regularly to make his objection first in the lower court, for it may be allowed and the superior court will not presume that the inferior tribunal intends knowingly to disregard the law: *Ex parte McMeechen*, 12 Ark. (7 Eng.) 70; *Ex parte City of Little Rock*, 26 Id. 52; *Ex parte Williams*, 4 Id. 537; *Ex parte Hamilton*, 51 Ala. 62; *State v. Judge of Fifth District Court*, 29 La. An. 806; *Barnes v. Gottschalk*, 3 Mo. App. 111.

ECFERT v. DES COUDRES.

[1 MILL, 69.]

LIABILITY OF INDORSER.—An indorser of a note or bill is not liable until payment has been demanded of the maker or acceptor, and notice of the dishonor given.

INDORSER AFTER MATURITY is not liable without demand and notice.

NEW TRIAL will not be granted because of the discovery of oral testimony.

ASSUMPSIT to recover the balance of an unsettled account. The defendants offered by way of set-off, a note made by one Rose and indorsed by the plaintiff to the defendants, to which the plaintiff objected on the ground that it did not appear that there had been any demand on the maker, or notice of non-payment given to the indorser. The set-off was for these reasons held inadmissible, and the plaintiff had a verdict.

Motion for a new trial: 1. Because the court erred in reject-

ing the set-off; 2. Because since the trial the defendants had discovered evidence to prove a demand on the maker and a refusal to pay.

Cogdell, for the motion.

Hayne, *contra*.

By Court, NORR, J. It seems to be a well established rule of law that the indorsee of a note of hand or bill of exchange cannot resort to the indorser until he has applied to the maker of the note, or the acceptor of the bill, and payment has been refused by him; nor until he has given notice to the indorser of such demand and refusal: *Tobey v. Barber*, 5 Johns. 73 [4 Am. Dec. 326]; 1 Salk. 124; 5 T. R. 513; 6 Id. 52; 7 Id. 66. An indorser does not undertake unconditionally to pay; he only becomes liable in the event of non-payment by the maker of the note, and notice thereof given to him.

It is contended, however, that as this note was indorsed after it became due it forms an exception to the general rule. But I have not been able to find any such distinction in the books; and in the case of *Berry v. Robinson*, 9 Johns. 121 [6 Am. Dec. 267], it is decided that no such distinction exists. Indeed, there is no foundation for it. It is never understood between the parties that the indorsee of a note, whether indorsed before or after it became due, should be allowed to lock it up in his desk without any effort to collect the money, relying on the indorser for payment. It forms the very essence of the contract that he shall demand it of the maker. The indorsement of a note of hand is a bill of exchange drawn by the payee on the payer, and which he has already accepted, and application must be made to the acceptor before recourse can be had to the indorser.

It has been repeatedly decided by this court that the discovery of oral testimony since the trial furnishes no ground for a new trial. And there is nothing in this case to give the defendants a very strong claim on the discretion of the court. For who could have known better than themselves whether they had demanded payment of the maker of the note? And it is difficult to conceive that they could not have ascertained the extent of their evidence on that point, if they had used due diligence before the trial.

The motion for a new trial must be refused.

The other judges concurred.

INDORSEMENT AFTER MATURITY.—"When a negotiable instrument is indorsed after maturity, payment must be demanded of the payor within a reasonable time, and notice, in the event of a refusal, given to the indorser, in order to charge him, it being regarded as equivalent to one payable on demand." Daniel on Neg. Inst., sec. 611. The principal case is cited and approved on this point in *Poole v. Tolleson*, 10 Am. Dec. 663; *Course v. Shackelford*, 2 Nott & McC. 283; *Kennon v. McRea*, 7 Port. (Ala.) 175; *Patterson v. Todd*, 18 Pa. St. 426. The decisions to this effect are numerous and uncontradicted. The following are some of them: *Jones v. Robinson*, 11 Ark. 504; *Beebe v. Brooks*, 12 Cal. 308; *Bishop v. Dexter*, 2 Conn. 419; *Guill v. Goldsmith*, 9 Fla. 212; *Bemis v. McKenzie*, 13 Id. 553; *McKewer v. Kirtland*, 33 Iowa, 348; *Coll v. Barnard*, 18 Pick. 260; *Davis v. Francisco*, 11 Mo. 572; *Light v. Kingsbury*, 50 Id. 331; *Dwight v. Emerson*, 2 N. H. 159; *Berry v. Robinson*, 6 Am. Dec. 267; *Leavitt v. Putnam*, 3 N. Y. 494; *McKinney v. Crawford*, 8 Serg. & R. 351; *Benton v. Gibson*, 1 Hill (S. C.), 56; *Union Bank v. Ezell*, 10 Humph. 385; *Chandler v. Westfall*, 30 Tex. 475; *Corwith v. Morrison*, 1 Pinn. (Wis.) 489. Some of the cases, however, apply the rule less stringently than others: See Daniel on Neg. Inst. 611.

THAT NEWLY DISCOVERED PAROL EVIDENCE is not a sufficient ground for a new trial seems to be peculiar to South Carolina. The rule is affirmed there in a number of cases: *State v. Harding*, 2 Bay, 267; *Price v. Jenkins*, 1 Nott & McC. 153; *Evans v. Rogers*, 2 Id. 563; and is applied even in capital cases, *State v. Harding*, 2 Bay, 267. A new trial on the ground of newly discovered evidence is not allowed in criminal cases in Iowa, owing to the fact that the statute has omitted to provide for it: *State v. Dowman*, 45 Iowa, 418. The general rule in most of the United States is that newly discovered evidence, whether written or oral, is, subject to certain necessary restrictions, a ground for a new trial, both in civil and criminal cases: 3 *Graham & Wat. on New Trials*, 1016 *et seq.* As to what is necessary to be shown in an affidavit for a new trial on this ground, see note to *Forester v. Guard*, *ante*, 143.

THE FACTS OF THE PRINCIPAL CASE would have justified the refusal of a new trial, however, under the most liberal rule. The case is commented on in 3 *Graham & Wat. on New Trials*, 1031, where it is said: "Considering the gross negligence of the defendant in the foregoing case, the court answered his application in terms of great moderation. That a party should offer a note on trial as evidence of indebtedness by the indorser, or as a set-off against him, without being prepared to prove the usual demand and notice, shows an extraordinary degree of stupidity. But an application for a new trial on the ground of having discovered such evidence, is an almost incredible absurdity."

DAVIS v. ROBERTSON.

[1 MILL, 71.]

SALES BY AUCTION are within the statute of frauds, but the auctioneer is the agent of both parties, and the note or memorandum made by him binds both.

ACTION to recover certain cotton purchased at auction. The

defense was the statute of frauds. Verdict for the plaintiff, and motion for a new trial. The questions presented and the necessary facts appear from the opinion of Nott, J.

Kennedy, for the motion.

Lance, *contra*.

By Court, NORR, J. This case presents three questions for the consideration of the court: 1. Whether sales at auction are within the statute of 29 Charles II., entitled an act for the prevention of frauds and perjuries; 2. If they are, whether a memorandum made by the vendue-master at the time is such a note or memorandum in writing as will take the case out of this statute; 3. If it is, whether the testimony of the vendue-master proving that such a memorandum was made, and the contents of it, is sufficient to authorize the plaintiff to recover, or whether the original memorandum must be produced.

The seventeenth section of the statute of frauds and perjuries, P. L. 84, declares that "no contract for the sale of any goods, wares, and merchandises for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The words of the statute appear to me to embrace all contracts for the sale of goods, wares, and merchandises, and I can see no reason for making sales at auction an exception from its operation. The case of *Simon v. Motivos*, 3 Burr. 1921, and 1 W. Bl. 599, does not decide the question. The judges say they are inclined to think sales at auction are not within the statute, but if they are, that there was a sufficient memorandum in writing to charge the party in the case, and it went off on that ground. The reason for the opinion thrown out by the judges is because sales at auction are usually effected in the presence of a great number of persons; a reason from whence I should draw a very different conclusion. The persons present frequently constitute a tumultuous crowd; the sales are generally conducted in a manner that affords the least possible opportunity for deliberation; the crier passes rapidly from one article to another; no person present takes an interest in anything except what regards himself, and that no longer than

while the article is immediately under the hammer; and although five hundred might be present, one probably could not be found, not even the auctioneer himself, who could recollect the price or purchaser of any particular article, two hours after it was knocked off. The effect of the other cases relied on is rather to show what is a sufficient memorandum to take a case out of the statute, than to show what cases come within it, and very well authorize the conclusion that without such note or memorandum the contract would have been held void. But the auctioneer being the agent for both parties, a note or memorandum in writing made by him is sufficient to charge the party. This principle is not only supported by the words of the statute, but is so well settled by numerous adjudged cases, that it ought not now to be drawn into litigation: *Buller*, 280; *Peake*, 232; 7 *East*, 558; *Bailey v. Ogden*, 3 *Johns.* 399 [3 *Am. Dec.* 509]. Whether the memorandum made in this case was sufficient for that purpose cannot now be determined, because it was not before the court. On the third point, the evidence was as follows: The auctioneer produced a book containing a memorandum of the sale, which was proved by himself. This was supposed, when first offered, to be the original entry, but in the course of examination turned out to be only a copy. An objection was then made to its admission, which was sustained by the court; the original was called for but was not produced; the court instructed the jury that this evidence was insufficient to enable the plaintiff to recover; they disregarded this direction, and found a verdict for the plaintiff.

I still think the verdict wrong. The first rule of evidence is, that the best the nature of the case will admit of must be produced. And the most familiar example put by way of illustration is, that where there is a written contract, the original must be produced, and its place cannot be supplied by a copy or parol evidence of its contents. The original book being the highest in this case, ought to have been produced; the case from 1 *Esp.* 270, where it was held that if a merchant's clerk could swear to the delivery of articles from recollection the books need not be produced, is not in point.

A merchant's books, when kept by himself, were not, by the rules of the common law, evidence of his demand; they are only allowed now from necessity, and certainly do not preclude the higher evidence required by the common law, to wit, the testimony of a third disinterested person who delivered the articles; but in the case under consideration the statute declares that

nothing short of a note or memorandum in writing shall make the party liable, and the common law then steps in and says that on a trial for the same the original must be produced. The motion for a new trial, therefore, must be granted

JOHNSON and CHEVES, JJ., concurred.

COLOOCK, J. In this case I consider the third ground as the most important, and before that is considered I deem it necessary to decide whether this is a case which is embraced in the statute of frauds. The manifest object of that statute was to prevent imposition by pretended contracts, supported by perjury, and of course it has more immediate relation to such as are made in private, and often supported by the testimony of a single witness. Sales at auction, occurring for the most part in large and populous cities, are at all times and in all places attended by a great concourse of persons whose immediate attention is drawn to the various contracts which are there made by the competition which usually exists, and are not liable to any of the mischiefs intended to be remedied by the statute of frauds; and this opinion is not only supported by reason but by authority. In the case of *Simon v. Motivos*, reported in 3 Burr. 1921, the court inclined to think "that buying and selling at auctions was not within the statute of frauds;" and in a more full report of the same case in 1 Wm. Bl. 599, the reasons are stated by the judges. Lord Mansfield says, "they (that is, sales at auction) certainly existed in England, and in all other countries, at the date of this statute. It is not, therefore, fair to conclude that if it was intended to comprehend them, that they would have been mentioned in the statute." And he adds, "according to the inclination of my present opinion, auctions in general are not within the statute." Wilmot, J. says, "it may be a great question, whether sales at auction are within the statute. They were certainly not meant by the act which was to extend to the mischiefs created by private and clandestine sales. Had the statute of frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good;" and here I remark that the case now before us is, in my opinion, a strong instance of the truth of the observation. "By protecting, rather than preventing frauds, I therefore incline to think," says the judge, "that sales by auction, openly transacted before five hundred people, are not within the statute," and Justice Yates says, "I much doubt whether the contract was within the statute of frauds."

Now if the case was not embraced in the statute of frauds, the evidence necessary to support the action was such as would be required by the rules of the common law, and such, I think, was produced. But it was said that late cases, and some were produced, show that this is not the established doctrine. Be it so, it is then open, I am free from the shackles of authority, and shall exercise my own judgment; in doing which I shall make every exertion to mete out justice, and that the justice of this case is with the plaintiff cannot admit of a doubt. The defendant makes the purchase while the water was yet dropping from the bags, and then states as a ground, that there was concealment in not stating that they had been wet with salt water. If the fact be true, that cotton is not more injured by salt than by fresh water, did not the condition of the cotton manifest that the injury was recent, and can it be supposed that any man of common sense would be ignorant that the salt water runs up our rivers for some distance? Does not the law on such an occasion require that men should exercise the powers of mind which all possess? I would not be understood as saying that the justice of every particular case must be bought at the expense of those general rules which are indispensably necessary in the conduct of human affairs, but that where the literal construction of statutes produced manifest injustice, that I would always be governed by its spirit and meaning, admitting that the rule be not proper to exclude sales at auction from the operation of the statute, I am against the new trial on other grounds. This particular case cannot be within its operation, because the defendant acknowledges the contract; when applied to for payment, what was his language? "If an abatement be made, I will take the cotton." This, I conceive, was as much as to say, "I did make the purchase, but I gave too much." Where a man acknowledges the contract, it is certainly not a case within the statute, and this Lord Mansfield expressly says, in the case before referred to: 1 W. Bl. 600. Speaking of exceptions to the statute, he says: "For instance, when a man admits the contract to have been made, it is out of the statute." Again I will suppose the case to be within the statute, yet I think it sufficiently proven. It is admitted on all hands that the auctioneer is in such cases the agent of both parties, and that considered in this light, his entry is a memorandum in writing, which will take a case out of the statute. There it was decided that the original entry made by him must be produced, but this I think contrary to the firm rule of evidence which requires the

best evidence the nature of the case admits. Now, surely the vendue-master himself is better evidence than his book. He knew that the plaintiff bought the cotton, and that a memorandum was made of the purchase, according to the usage of the vendue-master. He had a copy in his hands, which was perhaps to refresh his memory, and which might have been given not as of itself evidence, but as a statement of his testimony. If the vendue-master had not been present, then I concede that his original entry should have been produced. So in relation to merchants (an analogy which I conceive to be very strong), if he who delivers the goods be present, it is better evidence than the book, and the book is no more than a memorandum to keep alive his recollection. I remark, in some of the later cases, mention made of the delivery of a sale-note being considered as sufficient to take the case out of the statute. What these are is not very clear; they could not be notes of hand for the payment of the money, I presume. In the case *Becker v. Camier*, 1 Esp. 105, these sale-notes contain the price and quantity of the articles sold, and that one of them was usually given to the buyer, and the other to the seller. Now it would appear from this that they are nothing more than a mere account of the sales, such as was offered to the defendant in this case, and that upon this ground it may be said the case was taken out of the statute. Upon the whole, I am against a new trial.

BAY, J., concurred with Colcock, J.

THAT AUCTION SALES are within the statute of frauds, see *Bailey v. Ogden*, 3 Am. Dec. 509; Benjamin on Sales, sec. 110.

THAT THE AUCTIONEER is agent for both buyer and seller, see Benjamin on Sales, sec. 268, and the authorities there cited.

DE TOLLENERE v. FULLER.

[1 MILL, 117.]

LIABILITY OF BAILEES.—If a bailment be for the exclusive benefit of the bailee, the greatest care and attention is necessary to discharge him in case of loss; hence the bailee of a negress held liable when he sent her where the small-pox was known to be raging, and she sickened and died of that disease.

USING BAILED PROPERTY CONTRARY TO AGREEMENT.—If property is employed for a purpose different from that for which it was bailed, the bailee is liable for the loss or injury thereof, although he used due care.

ACTION on the case for damages for the loss of a certain negro, Catherine, who died of the small-pox in the defendant's charge. At the trial it appeared that the plaintiff, in 1808, hired a number of negroes to the defendant; that the defendant refused to take the negro, Catherine, on hire at any price, on account of her being old, but that he finally consented to her remaining on the plantation with the other negroes for the purpose of cooking, attending the sick, etc.; that the defendant afterwards sent her to Charleston to attend a sick lady; that on March 12, 1808, the plaintiff's agent, Patterson, informed the defendant that the small-pox was raging in Charleston, and that Catherine had never had the disease, and warned the defendant to send her back; that the defendant said she should be kept close and sent back when her services could be dispensed with; that on April 18 the defendant wrote to Patterson that he had learned with regret that Catherine was ill of the small-pox, but expressed a hope that it might not be so; that afterwards the defendant, in several conversations with Patterson, spoke of Catherine having died of the disease, and that on May 15 he wrote to Patterson to order up the negro who attended Catherine, but to caution him not to bring her clothes. The only evidence as to the value of the said Catherine was that she was a good old woman of fifty or sixty years of age, and as a cook and nurse useful and valuable; but further than this the witness declined expressing any opinion as to her value. Verdict for the plaintiff for two hundred and fifty dollars.

Motion for a new trial on grounds which sufficiently appear from the opinion.

Cogdell, for the motion.

T. S. Grimke, *contra*.

By Court, JOHNSON, J. The whole of the grounds taken for a new trial in this case may be comprised in two: 1. Whether the evidence is sufficient to charge the defendant; 2. Whether the amount of the verdict is warranted upon no other evidence of the value of the negro than her description and character. By the express terms of the contract, the plaintiff was not to derive any pecuniary advantage from permitting the negro Catherine to remain on the plantation with the rest of the negroes, a laudable indulgence and humanity must, therefore, have been the only inducement, as the defendant would have been bound

to have provided everything that was necessary for the others. That the defendant expected, and did derive a benefit from it, I think, is equally clear; for in the character of a cook and a nurse, in which service she was to be employed, it appears that she was considered as useful and valuable; but independent of every other circumstance, the fact of his having employed her in a different service from that contemplated by the contract, sufficiently proves it. The case, therefore, falls within that description of bailment where the greatest care and attention is necessary to discharge the bailee in case of loss. The question then, is, has defendant exercised the necessary care and attention in relation to this negro?

It is not necessary here to determine whether the mere fact of sending her to Charleston, in express violation of the contract, is of itself sufficient to charge him, for it must appear that the loss was the immediate consequence of that act, and his liability is the more obvious, when it is recollected that on the twelfth of March he is warned of the danger she is in, and yet he permitted her to remain exposed to the contagion of this dreadful malady until the eighteenth of April. But it is insisted, that there is not sufficient evidence that she did take the small-pox while in Charleston, or that she died with that disease. It is in evidence, however, that she was there on the twelfth of March, and that she remained there until the eighteenth of April, when it appears it had broken out on her, and it would be difficult to induce a belief that the infection was not taken during that period, more especially as it does not appear that she was exposed to it in any other situation. I think it also equally certain, that it was of that disease she died. The defendant, in his letter of the eighteenth of April speaks of it as a thing which is certain, but entertains a distant hope that it is not so; and in his letter of the fifteenth of May, he directs that her clothes shall not be sent to the plantation; obviously with a view of guarding against the possibility of disseminating the contagion; and, in frequent conversations with the witness (Patterson) he spoke of it as a thing certain, and never once questioned the fact.

Who, let me ask, was more interested, and more likely to be correctly informed than the defendant, as to this fact? And his declarations, in my mind, are as conclusive against him, as if it had been proven in the most unequivocal manner. If he had afterwards found out that he had been mistaken in this particular the means of showing it was peculiarly in his power, and

his not having even attempted it, makes the presumption irresistible; at any rate the jury were satisfied with it, and I see no reason for differing with them. The liability of the defendant will, I think, also appear from another view of this case. When property is bailed for a particular purpose, and a loss happens, the bailee is liable, even if it appears that he has used due care and attention; the legal presumption being, that the loss happened in consequence of this misuser. Assuming the fact, then, that the loss in this case happened in consequence of the negro being sent to Charleston in direct violation of the contract, the liability of the defendant is established, but, independent of the legal presumption, there is abundant proof that such was the fact.

It is true that the evidence as to the value of the negro, which may be considered as a *datum* by which to measure the damages, is not so conclusive as is always desirable; yet, when I see that the verdict is within bounds of probability, I do not think that a sufficient ground for a new trial. It is not in the nature of things to fix the value of this or any other species of property with mathematical certainty, and it is not difficult to conceive of a case in which it would be impossible to obtain even the opinion of persons who were conversant with the value of a particular article, except from its description and character. This might happen when the only witness of its identity was really ignorant of its value, or if a witness should capriciously refuse to give an opinion, I know of no means of compelling him; for it is easily evaded by saying he had no opinion on the subject. Better evidence, however, may usually be obtained, and is always desirable, and in the absence of it a jury ought to be cautious in giving great damages. Their verdict, however, in this case, appears to me to be within reasonable bounds, and I am not disposed to disturb it.

I am of opinion that the motion for a new trial ought to be discharged.

The other judges concurred.

LIABILITY OF BAILEE FOR MISUSER.—Among the exceptions made to the general rules laid down in Jones on Bailments, as to the liability of different classes of bailees, are the following: "4. A borrower and a hirer are responsible in all events if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement. 5. A depository and a pawnee are answerable in all events, if they use the things deposited or pawned." Jones on Bailments, 121. Judge Story, in discussing the subject of bailments for hire, states the rule as to misuser thus: "As to

the use of the thing hired. There is on the part of the hirer an implied obligation, not only to use the thing with due care and moderation, but also not to apply it to any other use than that for which it is hired. * * * And it may be generally stated, that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but, if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor. In short, such misuser is deemed at the common law a conversion of the property, for which the hirer is generally held responsible to the full extent of his loss." Story on Bailments, sec. 413. And in sec. 188, the rule as to mandataries is laid down with equal strictness: "And in cases of misuser, especially such misuser as amounts to evidence of a conversion, it is perhaps strictly true that every subsequent loss and injury, whether it be by accident or otherwise, will be at the risk of the mandatary. This is certainly the rule of the civil law, and it has been incorporated into many, and perhaps into all the systems of foreign law derived from it." The doctrine laid down in the principal case is clearly within the rule thus established by these distinguished commentators on the law of bailments. It is supported also by an almost unbroken array of decided cases: *Harrington v. Snyder*, 3 Barb. 380; *Mayor v. Howard*, 6 Ga. 213; *Ulmer v. Ulmer*, 2 Nott & McC. 489; *Duncan v. Railroad Co.*, 2 Rich. (S. C.) 613; *Hooks v. Smith*, 18 Ala. 338; *Mills v. Ashe*, 16 Tex. 295; *Spencer v. Pilcher*, 8 Leigh, 565; *Horsely v. Branch*, 1 Humph. 199; *Stewart v. Davis*, 31 Ark. 518; *Lucas v. Trumbull*, 15 Gray, 306; *Lane v. Cameron*, 38 Wis. 603. Says O'Neill, J., in *Duncan v. Railroad Co.*, 2 Rich. (S. C.) 613: "The law of bailments is as clear and as well settled as anything human can be, that the use of a thing hired in any way different from that for which it is hired, makes the person hiring it liable for any injury or loss in such service."

ILLUSTRATIONS.—The hiring of slaves is a class of bailments to which this principle has been frequently applied, and with great strictness. Thus the hirer of a slave, who has used him in an employment, or in a manner different from that stipulated in the contract, has been held responsible for his loss in cases where the slave's own volition has been the immediate cause of the loss. As where a slave hired as a boat-hand, went of his own accord, but with the hirer's knowledge, upon a log in the river to cut it away for the purpose of clearing a passage for the boat, and while so employed fell off and was drowned, after having been several times warned by the hirer to return to the boat, it was held that the hirer was responsible to the owner for the loss, it appearing that it was not among the duties of ordinary boat-hands to perform such labors: *Gorman v. Campbell*, 14 Ga. 137. So, where a slave was hired to work on a railroad with an express stipulation that he should not be employed on the cars and locomotives, although he was to be carried to and from his work when necessary on the cars, and it appeared that on one occasion he got on the train with the conductor's knowledge to go a short distance on the road, not in the regular course of his employment, and, in jumping off the car, was killed, it was held that the company was responsible, on the ground that it was a misuser to allow the slave to go on board the train except to be carried to his work: *Duncan v. Railroad Company*, 2 Rich. (S. C.) 613. Again, where the hirer of a slave cruelly beat him and abused him, and the slave had the good sense to run away so that he was lost to his owner, it was very properly held that the hirer was responsible for his value: *Robinson v. Varnell*, 15 Tex. 382. In another case a slave was hired, and it was covenanted in the contract that he should not be exposed to danger of any

kind. On one occasion, having been released from labor before sundown, he undertook to save a long walk around a pond by riding on a hand-car, on a railroad running through the pond, the hirer's overseer being also on the hand-car. On the way through the pond the hand-car was met by a locomotive and the passengers jumped from the car to save themselves but the slave was killed by the leap, and the hirer was held answerable: *Butler v. Walker, Rice* (S. C.) 182. Other instances are, where a slave was hired to labor on the streets of a town and was put to work at the mouth of a sewer, under a bank which fell on him and killed him, and the hirer was held liable for his value: *Mayor v. Howard*, 6 Ga. 213. So, where a slave hired as a house-servant was put to work on the plantation, and in crossing a stream on a log was drowned: *Hooks v. Smith*, 18 Ala. 338. Also, where a slave hired to cut timber for a steam-mill was employed in other work about the mill, and was injured, it was held that the hirer was responsible, irrespective of the question whether he had used due care and diligence or not: *Sims v. Chance*, 7 Tex. 561.

Bailments arising from the hiring of horses also furnish frequent illustrations of the application of the doctrine. Thus where a horse is hired to go to one place and the hirer is guilty of misuser by riding or driving him to another place, he is held responsible even for injuries resulting from unavoidable accident after the misuser: *Homer v. Thwing*, 3 Pick. 492; *Ray v. Tubbs*, 50 Vt. 688. So where a horse hired to go an agreed distance is ridden or driven farther, and is injured or killed on the journey: *Wheelock v. Wheelwright*, 5 Mass. 104; *Rotch v. Hawes*, 12 Pick. 135; *Lucas v. Trumbull*, 15 Gray, 306; *Fisher v. Kyle*, 27 Mich. 454; *Frost v. Plumb*, 40 Conn. 111. So where a horse hired for a specified time and is used after that time, and during such use is injured: *Stewart v. Davis*, 31 Ark. 518. Also, where a horse was taken to board with an express stipulation that he should not be used, and he was in fact used and afterwards died by "foundering:" *Collins v. Bennett*, 46 N. Y. 490. So where horses were hired to drive in the defendant's ice wagon and were sent to another town, it was held that the hirer would be responsible for their loss by an inevitable casualty: *Lane v. Cameron*, 38 Wis. 603.

MISUSER AS CONVERSION.—Many of the cases go on the principle indicated in the passage quoted above from Story on Bailments, that any misuser of bailed property is a conversion, rendering the bailee immediately liable for the value of the thing bailed. In accordance with this theory, of course it makes no difference whether a subsequent injury is occasioned by the bailee's negligence, or by unavoidable accident, or indeed whether any injury occurs at all or not; since the wrong is already complete by the misuser. On this principle, riding or driving a horse to a different place from that agreed upon, or for a longer distance, or using him in different work, has been held a conversion: *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Lane v. Cameron*, 38 Wis. 603. But it was held in *McNeill v. Brooks*, 1 Yerg. 73, that overloading a horse, by carrying two thousand dollars in specie on him, in addition to the rider's weight, was not a conversion. It is certainly a hard rule to hold that slight acts of misuser, by a bailee, of the thing bailed are to be regarded as evidence of a permanent appropriation of the property to his own use. Perhaps a more reasonable doctrine is that of the majority of the court in *Harvey v. Epes*, 12 Grat. 153, where it was held that unless the misuser was an absolute disposal of the property by sale or otherwise, or a total destruction of it, it would not amount to a conversion; and that, therefore, where slaves were hired to work on a railroad in

one county and were actually employed in another, this, of itself, would not amount to a conversion. Under this view, the fact of conversion is inferred only where the evidence shows that there was an intention to appropriate the entire property of the thing bailed, as by selling it: *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Willomatt*, 1 C. B. 672; *Fenn v. Bittleston*, 8 Eng. L. and Eq. 483; *Sanborn v. Colman*, 6 N. H. 14; *Sargent v. Gile*, 8 Id. 325; *Bailey v. Colby*, 34 Id. 29; *King v. Bates*, 57 Id. 446; *Ogden v. Lathrop*, 1 Sweeny (N. Y.) 643; *Bradley v. Parks*, 83 Ill. 169; or by delivering it to a stranger contrary to the instructions of the bailor: *Kowing v. Manly*, 49 N. Y. 192; *Lockwood v. Bull*, 1 Cow. 222; *Foltz v. Stevens*, 54 Ill. 180; or where, as a result of misuser, the property is actually lost to the bailor.

MISUSER AS CAUSE OF LOSS.—In analogy to the law regarding breaches of contracts generally, the correct principle would seem to be that where a bailee is guilty of misuser, and there is a subsequent loss, he is liable only if the loss is the result of the misuser; but as his violation of his contract is manifestly tortious, and injury has followed it, the injury ought to be presumed to be the consequence of his wrongful conduct, unless he can clearly prove the contrary. This, rather than the theory of conversion, seems to be the principle upon which Chief Justice Holt puts the doctrine in the great leading case of *Coggs v. Bernard*, 2 Ld. Raym. 909, where he says: "If a man should lend another a horse to go westward, or for a month; if the bailee go northward or keep the horse above a month; if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him." That is to say, the injury is presumed to be the result of the violation of the contract.

This is the principle applied to a particular class of bailees, to wit: common carriers, in cases of deviation. Thus where the master of a vessel carrying a cargo of lime deviated from his course and, a storm coming on, the lime became wet and set fire to the ship and so was destroyed, it was held that the deviation should be presumed to be the cause of the loss: *Dunn v. Garrett*, 6 Bing. 716. Tindal, C. J., said, in answer to an objection of the defendant: "But we think the real answer to the objection is, that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case." And generally, where a common carrier is guilty of any default, and a loss happens, he is liable only if the default occasioned the loss, and it is presumed to have done so until he shows the contrary: *Hastings v. Pepper*, 11 Pick. 41; *Hart v. Allen*, 2 Watts, 114; *The Paragon*, 1 Ware, 322; *The Rebecca*, Id. 188; *Collier v. Valentine*, 11 Mo. 299.

In accordance with this principle it was held in *Buchanan v. Smith*, 17 N. Y. Sup. Ct. (10 Hun) 474, that where the plaintiff loaned a yoke of oxen to plow up a hedge, and they were actually employed in hauling stone, it would be presumed, in the absence of proof to the contrary, that an injury which

happened to them in the bailee's possession occurred during, and in consequence of, the misuser. In *Cullen v. Lord*, 39 Iowa, 302, it was held that a bailee for hire, disregarding the bailor's instructions, was responsible only for loss resulting therefrom, and not from other causes, though it might be otherwise as to gratuitous bailees: See Story on Bailments, sec. 413 *a*, *et seq.*

HIMELY v. SOUTH CAROLINA INS. CO.

[1 MILL, 153.]

INSURANCE—MATERIAL CONCEALMENT.—Not to disclose the time of the arrival of a vessel, when asked, is a material concealment, although the arrival had been mentioned in the newspapers, and was known to one of the directors of the insurance company.

MATERIAL FACT.—Every fact and circumstance which can possibly influence the mind of a prudent and intelligent insurer is material.

DELAY IN THE VOYAGE.—An insured ship must proceed on her voyage with reasonable expedition and by the shortest and safest route.

RETURN OF PREMIUM.—Though an insurance be void for fraud committed by the insured, he is not entitled to a return of the premium.

ACTION on a policy of insurance dated July 6, 1804, on the schooner *Example*, from Barracoa to Charleston. It appeared that the vessel had sailed from Charleston May 23, and arrived at Barracoa May 29; that when the plaintiff applied for insurance he had two letters from Cott, the captain, informing him that he was ready to sail, but was waiting for the condemnation of a certain vessel at San Domingo; that one of these letters was laid before the board some days after the policy was signed, but neither of them was communicated before. When the application was made the plaintiff was asked "when the vessel expected to sail;" to which he replied that she had sailed from Charleston six weeks before. The schooner remained at Barracoa until August 28, and then sailed and was lost at sea in a hurricane, as was supposed. The defense was: 1. Concealment by the plaintiff of the arrival of the vessel at Barracoa on May 29, of the letters received from the captain, and of an order to the captain to wait for the above-mentioned condemnation at San Domingo; and, 2. Deviation. Verdict for the defendant and a motion for a new trial, on grounds which appear from the opinion.

K. L. Simons, for the motion.

Hayne, *contra*.

By Court, COLLOCK, J. The facts in this case having been

fairly submitted to a jury, and having been found against the plaintiff, would be a sufficient reason why a new trial should not be granted; but as it is a case of importance, I shall proceed to examine the plaintiff's grounds in their order.

In the first he says he has not been guilty of any concealment, because the arrival of his vessel was known to a director and had been published in the newspapers. In order to have availed himself of these circumstances as a refutation of concealment, he should have proven that the director had communicated his knowledge of that fact to the board, or that the publication in the newspapers had come to their knowledge; and from the testimony it is clear that they were not apprised of the fact. The arrival of the vessel had been announced in the papers, but this had taken place long before the company was formed, and the director who gave evidence on the trial did not state that he had communicated the information which he possessed to the board. It is asked if the plaintiff had not a right to presume that the board had a knowledge of the fact? The answer is, he should not have relied on presumptions, particularly when a question had been put to him calculated to produce a knowledge of the fact, and of course implying, at least, a doubt of it.

Why has the plaintiff not shown some reason for the evasive answer which he gave to the question put by the board? for surely it may be called evasive. The time of her arrival being known, it was certainly more easy to calculate the probable time of her departure from Barracoa than from the fact of her departure from Charleston. If he had not been desirous to conceal the fact of her arrival, why give an answer calculated to mislead them, nay, one which most certainly must mislead them in this particular? What is the rule on this subject? "The insured is bound by principles of moral honesty to disclose to the insurer all circumstances which may throw the smallest light on the nature and perils of the proposed adventure with the most unreserved candor and frankness:" Marsh. 465.

But it is said that the arrival of the vessel at Barracoa, if concealed, was not a material fact. "Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material:" Id. 467. What were the risks insured? The policy is in these words: "at and from Barracoa to Charleston, upon any kind of lawful goods or merchandise, laden or

to be laden on board the good registered American schooner, called the *Example*." The risk then commenced as soon as she began to load; and can it be said that the time of her arrival was immaterial? The sooner she arrived the sooner, of course, the risk might commence; but the fact was material in a more important point of view.

The insurance was effected in July; the vessel had been in port from the twenty-ninth of May, an unusual term; if they, the defendants, had known that she had been there from that time, instead of the eighth or thirteenth of June, although they may not have considered her as a missing vessel, yet they would undoubtedly have been more cautious in insuring, or at all events have been set upon inquiries which may have led them to the truth.

The third ground states that there is no proof that Cott had instructions to wait; that the plaintiff may have been misled by his (Cott's) information, and that the facts and circumstances show that he did not wait for the condemnation. Cott says in his letters, I am ready to sail, but waiting for the condemnation. Plaintiff swears that he had sent by Cott expressly for the condemnation, and that he expected it daily. If this be not proof I am at a loss to conceive what will be considered as proof. It is said, however, the circumstances of the case contradict their testimony. Circumstances are only resorted to in the absence of positive proof. But what circumstances, I would ask, could be sufficiently strong to counteract the positive evidence of those persons, who alone possessed the knowledge of the fact to be proven? It is clear that the circumstances do not contradict the testimony of the plaintiff, and the letters of the captain, which are those which are relied on to produce this effect; that the captain had not begun to load until July —; that he obtained a clearance on the thirteenth of July, and that afterwards the crew and captain were sick. These circumstances may be true, and yet the captain may have been sent for the document, and may have waited for it. But what induced the affidavits of the plaintiff? It was made to postpone a cause of great importance in which the document sued for was indispensably necessary, and it was to be obtained from the island of St. Domingo, which is a few days' sail from Barracoa. Do not these circumstances corroborate the affidavit of the plaintiff and the letters of the captain? It is said the plaintiff may have been misled by the information of the captain, but the plaintiff's affidavit relates to facts within his own knowledge; he there-

fore could not have been misinformed. He says in his first affidavit, June 18, "I sent by Captain Raymon Cott to inquire for and obtain a condemnation, which was supposed to have been made in a tribunal of the French republic;" and in the second, dated the twenty-fifth of July, which, for safe carriage, he (Cott) was to bring back with him. The facts stated in the fourth ground may all be true, and yet the plaintiff not entitled to a new trial; admit that his stay at Barracoa was not longer than is usual in the course of trade, yet if it is clear that he may have sailed before the thirteenth of July, and had waited for a document, the policy is void. It is a rule that the ship shall proceed on her voyage, not only by the shortest and safest course, but also with all reasonable expedition: Marshall, 153. Now he states himself, he was ready to sail before the thirteenth of July, and the witness, who went there, when he purchased a return cargo, proves this also.

The fifth ground is, that the policy was confirmed by the answer of the board, that it would cover specie, and also by a refusal to return the premium. When the first letter of Cott was shown to the board by the plaintiff, a few days after the policy was signed, it does not appear that the board was informed that the plaintiff had received this letter before the insurance was effected. They may not then have discovered his concealment; and if it was not discovered, they could not have complained of it, or intended to waive any right which might result from it. When they refused to return the premium, they had discovered the fraud, and therefore had a right to retain it. "In all cases of actual fraud on the part of the insured, committed either by himself or his agent, the underwriter shall retain the premium:" 11 Marsh. 652. Upon the whole I think the case clear of doubt, that there was a concealment, and of a material fact; that Cott was charged to bring the condemnation, which it is manifest was an important document, and was wanted by the plaintiff at that very time; that he was detained by waiting for this document, and therefore that the policy was not made, as it professes to be, *bona fide*, and is void.

The motion for a new trial was therefore refused.

CHEVES, J., gave no opinion, having been of counsel in the case.

CONCEALMENT.—As to the obligation of the insured to communicate material facts within his knowledge affecting the risk, see *Marsh v. Muir*, 2 Am. Dec. 648; *Price v De Peau*, Id. 680.

DELAY AND DEVIATION.—On this point see *Earl v. Shaw*, 1 Am. Dec. 117; *Hood v. Nesbit*, Id. 265; *Patrick v. Ludlow*, 2 Id. 230; *Reade v. Commercial Ins. Co.*, 3 Id. 495; *Clark v. United F. & M. Ins. Co.*, 5 Id. 50; *Savage v. Pleasants*, 6 Id. 424.

TOPHAM v. CHAPMAN.

[1 MILL, 283.]

FOREIGN BANKRUPTCY.—An assignment made in a foreign country under its bankruptcy statutes does not pass the title to the bankrupt's property in this state, as against creditors attaching here.

FEIGNED issue to try the right to certain moneys attached as the property of Thomas Topham, an absent debtor who resided in England, and had been there adjudged a bankrupt. Verdict for the plaintiffs, and a motion to set the same aside.

. *Hayne*, for the motion.

H. A. Desaussure, contra.

By Court, NORT, J. The defendants in this case are creditors of Thomas Topham, a bankrupt in England. Since the commission of bankruptcy, and after the property was assigned to the plaintiffs, the defendants procured attachments to be levied on his property in this state; and the question now to be determined is, whether the attaching creditors or the assignees are to be preferred? The question has been tried on a feigned issue, and a verdict found for the assignees, who were plaintiffs. Whether the persons attaching are really American citizens or British subjects, does not appear. We are bound, therefore, to consider them as American citizens, though I am not aware that it would make any difference in the ultimate decision of the question: *Sed vide*, 1 Maryland Rep. 236. It is a question of no inconsiderable importance; and if it was now for the first time to be decided, it would not be less difficult than important; and it is due to the counsel on both sides to say that the cause has been argued with learning and ability equal to its merits, and I hope has received from the court the deliberate consideration which its importance demands. A respect for the laws and judicial decisions of other nations is a cardinal principle with all civilized governments; and a just regard for our national character makes it a duty which we owe to ourselves as well as to our country, to preserve those social and political relations which the comity of nations has established, and which are indispensable to that harmony and

friendly intercourse which ought to subsist between them. And I trust it will be found that in the decision of the case now under consideration those principles have not been disregarded, nor the great land-marks erected by the great men who have gone before us, passed by unnoticed. All laws have for their basis public policy; and the laws of every country are directed to the peculiar benefit and advantage of that country. They cannot, therefore, have immediate operation within the jurisdiction of another. That they ought to be respected, I have already admitted. But how far they ought to have effect in settling the conflicting claims of individuals arising under their respective laws, has never yet been determined; and perhaps cannot be with exact precision. The decisions of the English courts on the subject are acknowledged by their own judges to be confused and contradictory; and if, in settling this question, we should look to the decisions of our own courts in preference to theirs, if they should be found at variance, it will not be considered a departure from those principles of national hospitality by which we profess to be governed. It will nevertheless be satisfactory to find that the decisions of the American tribunals are supported by the opinion of some of the ablest judges which have ever adorned the English bench.

The first case brought to our view is the case of *Jones v. Blanchard*, decided in this state as early as the year 1785. That case was so precisely similar to this, that we might say, "*mutato nomine de te fabula narratur*;" and although that decision may not be entitled to the weight and authority of law, it is entitled to more respect than a mere *nisi prius* decision. It was decided by two judges, on great deliberation, after full and able argument. It was then held at that early period of our national existence that an assignment of a bankrupt's estate in England gave his assignees no lien on his property in this country, and that attaching creditors were entitled to a preference. In the year 1807, more than twenty years after, the same question arose again in the circuit court of the United States, sitting in this state, and was decided the same way: *Harrison v. Sterry et al.*, Bee's Admiralty Rep. 247. In that case the Judge says: "The attachment act of this state is founded on a broad basis, and no commission of bankruptcy in England, even before our separation from that country, was ever allowed to interfere with its operation."

And that opinion derives no inconsiderable weight from the consideration that Judge Bee was one of the counsel employed

in the case of *Jones v. Blanchard*. He was an old and experienced lawyer, and well acquainted with the decisions in this state. And from his emphatical manner of expression, we may conclude that he considered the law as settled at that time. It is probable that that has been a leading and governing case ever since. And where a decision has been made by a competent tribunal, although not of supreme authority, if it has been acted upon for years, and commonly received and acknowledged as law, it ought not to be departed from unless it shall be found upon the most mature deliberation to be radically wrong. But this case is not subject to that imputation; for the case of *Harrison v. Slerry*, was carried up to the supreme court of the United States, and received the support of that court: 5 Cranch, 302. If, therefore, we are to be governed by authority, it might be supposed that higher would not be required. In addition to those are the cases of *Taylor v. Geary*, decided in the supreme court of Connecticut, at a time, when, I believe, that bench was never better filled: Kirby, 313; and *Milne v. Moreton*, in the supreme court of Pennsylvania, 6 Binn, 353 [6 Am. Dec. 466]. And as far as the American cases have come to my knowledge, the decisions have been uniform; and these are not the hasty opinions of single judges, but the deliberate decisions of the supreme courts of the several states, and of the United States, and if any collision actually exists between the tribunals of the two countries, our own are entitled at least to as high respect as those of England in a question of this sort. But I apprehend that no greater difference of opinion will be found between them on this than might be expected on any question of equal importance and difficulty. But be that as it may, our decisions are not unsupported by high authority from that country. Lord Mansfield says: "If after a bankruptcy, and before payment to the assignees, money owing to the bankrupt out of England is attached, *bona fide*, by regular process, according to the law of the place, the assignees in such case cannot recover the debt: *Le Chevalier v. Lynch*, Doug. 170." And further: "The statutes of bankrupts do not extend to the colonies, or any of the king's dominions out of England; and that the assignments under such commissions take place only between the assignees and the bankrupt, but do not affect the rights of any other creditor:" Cook's Bank. L. 243-347. So far the decisions of the English courts correspond with our own.

On the other hand, it is laid down that the assignment of the commissioners vests the property of the bankrupt in the as-

signees, although they are in a foreign country: Cullen's Bank. L. 184, 243; Lex. Mer. Amer. 520; 4 D. & C. 182; *Hunter and Potts*, 4 T. R. 182; *Sill v. Worswick*, 1 H. Bl. 689. But in all these cases the question arose between British subjects, and in their own courts. In Lex. Mer. Amer. 520, the principle is expressly restricted to "creditors who reside within, and are citizens or subjects of, the state to which the bankrupt belongs." The case of *Sill v. Worswick* was an action brought against a creditor in England by the assignees of a bankrupt there, to recover money which he had recovered on an attachment in St. Christopher after the assignment, and which had been remitted to him in England. Lord Loughborough says, "the defendant is resident in England, the process was founded on an act done by him in England, and under the aid of the laws in England. It is not," his lordship says, "a question whether the bankrupt laws have an operation at St. Christopher, but whether they operate at Lancaster, England; whether a creditor resident in England subject to the laws of England, shall avail himself of that law to enable himself to get possession of a debt from those who are entitled to that debt, and who have the distribution of it for the benefit of all the creditors, and to hold that possession against those creditors." In that case and under those circumstances, it was held that the assignees were entitled to recover. The case of *Hunter and Potts*, 4 T. R. 182, was to the same effect.

The amount of those decisions is, that it is contrary to the policy of the bankrupt laws of England, that one creditor should by any means get possession of a portion of the bankrupt's estate to the exclusion of the rest, and that the money so received shall be for the use and benefit of the whole. But Lord C. J. Eyre strongly combats this principle, even as between British subjects, and speaks of it as a point conceded, that it is a diligence "which all persons who are not British subjects may lawfully pursue," to contravene their bankrupt laws. Again his lordship says, "you admit that an American might, in this case have pursued his legal diligence in the courts of his own country, notwithstanding our bankrupt laws, and you could not have taken the money from him and given it to the assignees:" *Phillips and Hunter*, 2 H. Bl. 412. And further says, the decisions authorizing the assignees to recover, even from a British subject, money so received, are bttomed on a new invented legal maxim, that no "British subject shall be allowed to contravene an act of parliament." And even Lord Lough-

borough says, that it by no means follows from what he has laid down, "that a commission of bankruptcy has an operation in another country against the laws of that country." Nor does he wish to be understood that a creditor in that country, not subject to the bankrupt laws, having obtained payment of his debt, and afterwards going to England, would be liable to refund that debt. The cases of *Solomons v. Ross*, and *Jillet v. Deponthieu*, are the strongest that I have found in behalf of the assignees. But these cases are only to be found in the marginal notes of 1 H. Bl. 131-2, and are so imperfectly reported that little can be inferred from them, and from the manner in which C. J. Eyre speaks of them, it would seem that he considered them of very doubtful authority. I have now gone through all the cases which it appears to me necessary to notice in this case, and it only remains to draw the conclusions deducible from them. The bankrupt laws of Great Britain are a great system of commercial policy. The object of them is, on the other hand, by a direct and speedy operation to distribute the proceeds of a bankrupt's estate equally among his creditors, according to their respective demands, in such a manner as to do equal justice to them all; and on the other, to relieve an honest but unfortunate debtor from a load which would otherwise hang forever like a mill-stone about his neck, and to afford him a hope and prospect of acquiring something in future for the support of himself and family; and by whatever means any creditor gets possession of his estate or money, he is considered as having received it for the use and benefit of all. The foundation of this opinion is, that by the assignment of all the goods of the bankrupt, *ubicunque fuerunt*, vest immediately in the assignees, and as between the bankrupt and the assignee, and as between British creditors residing and suing there, I am willing to admit the principle. But there is a very obvious distinction between an assignment by the party and one by operation of law. All personal contracts are transitory; all municipal laws are local.

The assignment confers an equitable right; it is a power of attorney *ad colloquendum*, but it vests no legal interest. The assignee may sue in the name of the bankrupt in a foreign country, and receive the money to his own use; but he cannot sue in his own name: 2 Johns. 342 [*Bird v. Caritat*, 3 Am. Dec. 433]. And although he may have a legal title in England, under the law, it creates no such lien on the property there as will defeat a legal process in this country. This is illustrated by

the analogy of the law in other cases. Judgments and executions give a lien on property in England; but they have no binding efficacy beyond their jurisdiction; and a foreign judgment in marshaling the assets of a deceased person, is considered only as a simple contract. It is true the personal estate of a person dying intestate, must be distributed according to the laws of the country where the deceased belonged, but his debts in a foreign country must be paid according to the laws of that country. The legal title to his goods at home is also immediately vested in his administrator, but he has no control over his goods abroad. Administration must be granted there, and the debts of the deceased there must be paid, before the administrator will be permitted to pay over the money to his representatives; otherwise the funds of the deceased (as also those of a bankrupt) might be drawn out of the country for the benefit of the home creditors, to the exclusion of those abroad. I am of opinion, that law, justice, and public policy, all combine to give a preference to the attaching creditors.

The verdict, therefore, must be set aside.

The other judges concurred except CHEVES, J., who gave no opinion, having been concerned in the case.

ASSIGNMENT UNDER FOREIGN BANKRUPT LAW.—On this subject, see *Bird v. Caritat*, 3 Am. Dec. 433; *Milne v. Moreton*, 6 Id. 466 and note; and note to *Ramsay v. Stevenson*, ante, 468.

SHACKELFORD v. PATRICK.

[1 MLL, 311.]

IN AN ACTION AGAINST A MASTER OF A VESSEL for goods damaged in a voyage, it is not necessary for plaintiff to show that he has sold any part of the goods.

ACTION for damages to certain goods of the plaintiff shipped on a sloop, of which the defendant was master, to be carried from New York to Georgetown, through the alleged neglect and unskillfulness of the defendant and his agents. It appeared that the vessel had not been sufficiently and skillfully dunnaged, which the plaintiff claimed was the cause of the damage. The defendant claimed that the damage was caused by a severe squall, from which, it was testified, that the vessel

suffered. The damaged goods were proved to have been sold, but none of those not damaged.

The judge instructed the jury, that where part of a shipment was damaged the whole must be sold on account and risk of those concerned, to ascertain the damage, and that the plaintiff, not having pursued this course, the defendant was entitled to a verdict. Verdict for the defendant. Motion for a new trial: 1. Because the verdict was contrary to evidence; 2. Because the judge misdirected the jury as to the matter of selling the goods.

King, for the motion.

By Court, CHEVES, J. I will consider the second question first. And clearly, it was not necessary on the part of the plaintiff to sell the whole or any part of the goods, to entitle him to a verdict. It was only necessary for him to prove the quantum of the damage, the cause of it, and that the cause was one for which the defendant was responsible. A sale sometimes serves the purpose of fixing the extent of the damages, but any other sufficient testimony will serve the purpose and is sometimes better evidence on the point. The case will often happen, in which the possessor would not part with the damaged article for any sum of money, and because it was thus inestimable, would he have no remedy for an injury which it had sustained by negligence or want of skill in the transportation of it. Suppose the articles shipped, were pieces of extraordinary value in the fine arts, for example, exquisite paintings; would the possessor be obliged to bring them to the vendue-master's hammer, before he could recover? But the point is very clear, and need not be enlarged upon. The ground of misdirection will, therefore, entitle the plaintiff to a new trial, unless the court can see very clearly that the verdict ought to have been for the defendant on other grounds.

The only other question is, whether the evidence justified the verdict, but whether it did or not, we need not determine. It is enough that we cannot see clearly, that, if the charge had been correct, the jury, notwithstanding, ought to have found the same verdict. We give no opinion on the evidence, but on the ground of misdirection.

The court is unanimously of opinion, a new trial ought to be granted.

TOOMER v. PURKEY.

[1 MILL, 323.]

AMENDMENT OF EXECUTION.—The omission of the words “lands and tenements,” in an execution is a clerical error which may be corrected on motion.

SALE AFTER RETURN DAY.—If an execution be levied before the return day the sheriff has authority to sell afterwards.

EJECTMENT UNDER SHERIFF'S DEED.—If the defendant in execution was never in possession of the property sold, the purchaser in an action against a stranger must put his whole title in evidence.

TRESPASS to try title to a certain tract of land.

The plaintiff gave in evidence a sheriff's deed to himself and a judgment and execution from the court of common pleas in the case of *Williams v. Robertson*, in which execution the sheriff was directed to levy the amount of the “goods and chattels” of Robertson omitting the words “lands, tenements, etc.,” which the law authorized; also a sheriff's deed to Robertson under an execution from the court of common pleas in the case of *Carrington v. Kennedy*, but it appeared that the sale was made after the return day of the execution, although the levy was made before; also a deed from one Gulet to Kennedy, and a grant to one Miles in 1774, but there was no evidence of a conveyance from Miles to Gulet or to any other person. It did not appear that the plaintiff or any of those through whom he deduced title had ever been in possession. Verdict for the plaintiff, and a motion for a new trial, because: 1. The execution against Robertson did not authorize the sale of lands; 2. The sale on the execution against Kennedy was made after the return day; 3. There was no evidence of a conveyance from Miles, the grantee, to Gulet.

Prioleau, for the motion.

Hayne, contra.

By Court, JOHNSON, J. 1. By an act of the legislature, real estate, *quoad hoc*, is put on the same footing with personal, and a plaintiff has the same right to have his judgment levied as well of the one as of the other. An execution is the process which the law gives to enforce a judgment, and ought to pursue the law. It is a remedy which a plaintiff has a right to ask of the court, and which the court is bound to extend to him to the utmost extent of the law. The omission, therefore, of the words, “lands, tenements, etc.,” in the execution in the case

of *Williams v. Robertson*, is clearly a clerical mistake; considering it therefore as the act of the court, and not of the party, I should be disposed to think, if it were necessary, that the court would, even at this day, entertain a motion to amend it, so as to render it consistent with, and make it as efficient as the law itself.

2. The case of *Sims v. Randall*, 2 Bay, 524, is relied on as a case in point in support of the second ground. This case, however, differs from that in one very important point. It appears from a manuscript note of that case, with a view of which my brother Bay has been good enough to indulge me, that this case is distinguished from that by the important fact, that the levy there was not made until after the day on which the execution was made returnable. An execution gives power to the sheriff to do a particular act within a limited time; and it appears to me, that when he has once entered on the execution of that power, there can be no good reason why he should forbear until the object of it is fully attained. I am therefore of opinion, that where a levy has been regularly made, the sheriff may in all cases proceed to close the execution by a sale, notwithstanding the day of sale is subsequent to the day on which the execution is returnable, where the levy has been made before.

On the third ground, however, I am of opinion the motion for a new trial ought to be granted. There are cases in which the presumption of ordinary deeds of conveyance, and even a grant, the most solemn of all deeds, may be authorized: *Phillips's Ev.*, 119; *Archer v. Sadler*, 2 Hen. & M. 370; *Lessee of Alston v. Saunders*, 1 Bay, 26. But that presumption is only authorized in favor of a possession of long standing, and when it is apparently *bona fide*. In this case, neither the plaintiff nor any one individual, through whom he derives title, was ever in the possession, as well, therefore, might a presumption in his favor extend to any other tract of land in the state, as to the one in question.

It has been assumed, as a ground in the argument in this case, that the plaintiff ought to be favored in consequence of his claiming under a sheriff's title, and cannot be presumed to make out a regular chain of title. Great indulgence is, and ought to be, extended to persons claiming under a sheriff's deed, as in most cases a forlorn debtor continues his hostility even to those who purchase his property; but I think it is sufficient, that such a title is conclusive between the purchaser and

the parties to the suit, and those claiming under them. But between a purchaser and a stranger, I can see no good reason why the rule that a plaintiff must recover on the strength of his own title, and not the weakness of his adversary's, should not apply with all its force. To vary this rule in favor of persons claiming under sheriff's titles generally, would have the effect of subjecting the property of every man who had not the most perfect title to it, indiscriminately to the payment of the demand of any creditor against his debtor, however fair and honorable the possession might be, and however disconnected the possessor might be with the debtor.

The other judges concurred, except CHEVES, J., who gave no opinion, having been concerned in the case.

AMENDMENT OF EXECUTION.—See Freeman on Ex., ch. VI.

SALES AFTER RETURN-DAY.—See Freeman on Ex., sec. 106.

PEARSON v. WIGHTMAN.

[1 MILL, 336.]

PROOF OF A WILL.—If the witnesses to a will cannot be found, or though found, deny their signatures, circumstantial evidence may supply the deficiency. The handwriting of the witnesses may be proved, and the jury left to determine from all the circumstances whether the will was published with the requisite formalities.

WILL ON SEVERAL SHEETS OF PAPER.—It has never been determined that each of the several sheets of paper on which the will is written must be signed by the testator.

EVIDENCE OF SUBSCRIBING WITNESS need not show that he recollects the time and occasion when he acted as a witness. It is sufficient that he identifies his signature, and feels assured in his own mind that he would not have affixed it without first hearing the will acknowledged.

TESTIFYING FROM MEMORANDA.—A witness may testify from written memoranda, though they do not recall the facts to his memory; and such evidence is better than unaided recollection.

TRESPASS to try title to certain land. The plaintiffs claimed as heirs at law of Benjamin P. Williams, deceased. The defendant, who was in possession, claimed as administrator, with the will annexed, of the said Williams. The validity of the alleged will was the principal question.

The will was written on two sheets of paper, in the testator's handwriting, the first sheet containing his name in the intro-

ductory clause, and the second being signed by him. It purported to have been executed and published October 24, 1804, in the presence of Jacob Breaker, David Platt, and Lewis F. Breaker. It appeared that on the death of the testator in 1809, Jacob Breaker was informed that he was a witness to the will, and was requested to prove it before the ordinary. He declined to do so, saying that he had never witnessed a will for the deceased. He afterwards consented, however, to appear before the ordinary, and on being shown his signature, said it appeared to be his handwriting, and he supposed he must have signed it, though he did not recollect it. He was then sworn, and the usual probate annexed to the will, stating that it was executed and published by the testator in his, Breaker's presence, and in that of the two other witnesses, and that they subscribed their names as witnesses.

At the trial, Jacob Breaker denied having sworn to these facts, and declared that he had no recollection of witnessing the will, but that he believed his name was in his handwriting, and that he must have signed the will under the impression that it was some other paper. He would not say that Lewis F. Breaker's name was in his handwriting, but admitted that it looked like it, and he supposed it might be his. He said he did not know the handwriting of Platt, who was his brother-in-law, and had sometimes lived in his house, and he admitted having taken receipts from him.

Mr. Keckley testified that the testator told him he had made his will and who were the executors, and though he would not be positive, he thought the testator said that the two Breakers and Platt were the witnesses. He swore also, that in 1810, Jacob Breaker told him he had seen the will and that his name was in his handwriting, and Lewis Breaker's and Platt's were in theirs.

Mr. Hume testified that the ordinary asked Jacob Breaker when he proved the will, "if he saw B. P. Williams sign, seal and deliver that paper, and if he saw the other subscribing witnesses sign with himself;" he did not recollect that he said yes, but he kissed the book; that the probate was written in another room, but that the ordinary signed it in his presence, and though he did not know that Breaker saw it, he thought he might have seen it.

Lewis F. Breaker testified that he had no recollection of signing the will; that his name looked like his handwriting, as it was at the trial, but not as it was at the date of the will, for he

had lost the use of his right hand in 1805, and ever since that time had written with his left; that from this circumstance and from his not recollecting having signed the will, he doubted whether the handwriting was his, but would not be positive that it was not, and that if his name had been cut out of the will and not connected with its date, he should have thought it was his handwriting. He did not know Platt's handwriting.

Platt swore that his name resembled his handwriting, but that he never put it there, and that if Jacob Breaker swore that he (Platt) was present and signed the will, he would not believe him, although he would generally believe what he said on oath.

The handwriting of the Breakers was fully proved by Messrs. Middleton Smith, Deas, and other witnesses, but of Platt's there was no evidence except what is mentioned above. The Breakers appeared to be men of good character.

The judge charged the jury that the execution of the will was not duly proved according to the statute, but they nevertheless found for the defendant. Motion for a new trial on the ground, 1. That the execution of the will was not duly proved; and, 2. That three of the jurors were members of a corporation entitled to a legacy under the will.

Pringleau and Richardson, for the motion.

T. Parker, *contra*.

By Court, CHEVES, J. On the part of the plaintiffs it was contended on the first ground that proof of publication in the presence of three or more credible witnesses was indispensable; that the evidence did not afford this proof; that the proof was not satisfactory as to any of the witnesses. But that clearly, as to Platt there was no evidence; that the testator himself must have counterfeited the name of the witnesses. That the will being written on two sheets of paper, and the testator's name subscribed to but one, there was not a sufficient signing under the statute. The defendant contended that the will was in all respects well executed under the statute; and that it was proved to be so; that when subscribing witnesses deny their signatures, other proof may be adduced, and will be sufficient; that proof of their handwriting is good evidence to supply this deficiency; that the proof of the handwriting of the Breakers is indisputable, and that the handwriting of Platt has been sufficiently proved; that the suggestion that the testator had himself counterfeited the signatures of the witnesses, was mere conjecture, and in itself altogether incredible.

There was no question of fraud in the case. The only question was, whether the will was executed according to the provisions of the statute of frauds so as to pass the lands? The law on this subject is free of any difficulty. Where subscribing witnesses cannot be produced, they deny their signatures, or otherwise fail to prove the due execution of the will, circumstantial evidence may be adduced to supply this deficiency. Of this description of evidence proof of the handwriting of the subscribing witness is the most direct and usual. It would be of terrible consequence if such testimony were not admissible, for how often and how easily might witnesses be tampered with to deny their own attestation? It will not follow that proof of the handwriting of the subscribing witnesses will be conclusive evidence of the validity of the will. Attention must always be paid to the distinction between what shall be deemed a literal compliance with the provisions of the statute, and what shall be sufficient proof to rebut any imputation of fraud: *Austin v. Willis*, Bull. 264; *Pike v. Baderning*, 2 Str. 1096; *Alexander v. Clayton*, 4 Burr. 2224; *Longchamp v. Fish*, 2 New Rep. 415; *Lowe v. Jolliffe*, 1 Bl. 365; *Croft v. Pawlet*, 2 Str. 1109; *Hands v. James*, 2 Comyns, 530. Some proof of publication, as was argued by the plaintiff's counsel, is necessary. But in such cases publication may be presumed, and it is a question for the jury whether, under the circumstances of the case it is probable all the formalities of the statute have been complied with: *Croft v. Pawlet* and *Hand v. James*, *supra*; also *Phillips* on Ev., 363, 363.

It has never been determined, I believe, that where the will is written on several sheets of paper, the testator must sign all of them. The authority relied upon by the plaintiff's counsel, 6 Cruise's Digest, 51, sec. 12, is not supported by the authority cited, nor, I believe, by any other. The position laid down by this writer is, "the want of signing all the sheets of a will cannot be supplied; so that, although the deviser intended to sign but becomes incapable of doing it by sickness, such a will cannot take effect;" and he cites in support of this position only the case of *Right v. Price*, Doug. 241. In that case the will was written on five sheets of paper; the testator set his mark to the two first, but was too weak to sign the others. Lord Mansfield says, "this will was not duly executed; for when the testator signed the two first sheets he had an intention of signing the other sheets, but was not able; he therefore did not mean the signature of the two first sheets as a signature of the

whole will," and evidently rests the question upon the intention of the testator. Cruise himself probably did not mean to be understood in the sense contended for, because in the preceding page but one (p. 49, sec. 7), he says, "where a will is written on several sheets of paper, it is the usual practice for the testator to sign each of them," and it is certainly very proper, though it is not indispensable.

I have said so much on this point, lest in showing its inapplicability, as I shall presently do, to this case, it might be considered as a tacit admission of the correctness of the position. In the case before us, both sheets of the will were signed by the testator according to the received and unquestioned construction of the statute. The will is in his own handwriting, and on the first sheet begins in the usual form: "The will of Benjamin Paul Williams," etc., or words to that effect, which is a sufficient signing within the statute, and he has in the usual form subscribed the second sheet.

There is, then, no point of law in the case, and the only question is, whether the execution of the will in the presence of three witnesses has been, merely as a question of evidence, sufficiently proved? The simplest way of considering this question will be to proceed with the witnesses successively. Jacob Breaker swears that though he has no recollection of having witnessed a will of testator's, yet he believes his name to be of his handwriting, and that he must have signed it under the impression that it was some other instrument. It was not necessary he should have witnessed it under the impression it was a will, nor is it necessary he should recollect the publication of the instrument, for if he were dead, or had denied his handwriting, on proof of his handwriting it might be presumed. If he had denied his handwriting, the testimony of Mr. Deas, and particularly of Mr. Middleton Smith, or either of them, would have been sufficient to have sustained the verdict on that point.

Lewis F. Breaker does not positively deny his name to be of his handwriting, but he doubts it, because he has no recollection of having witnessed any instrument which was executed by the testator; and because at the time of the date of the will his signature differed from that which appears to the will; he would otherwise believe his name to the will to be in his handwriting. Now, I hold it not to be necessary that a subscribing witness should recollect the time and occasion when he subscribed the instrument as a witness. It is enough if he recog-

nizes his handwriting, and is perfectly assured in his own mind that he never subscribed an instrument as a witness without having seen it executed or acknowledged as the nature of the act requires; and none but an idiot or a villain can be conceived capable of such an act of folly or wickedness as to subscribe an instrument as a witness when he has not seen it executed or heard it acknowledged. We have, during the present term, decided the principle on which this point turns, *Haig v. Newton*, and refused to hear argument on it in another: *Sharp v. Bingley*. We decided in these cases that the testimony of a witness who swore positively from written memoranda, though they did not recall to his memory a recollection of the facts, was admissible; and we were further of opinion that such testimony was better evidence than an adventurous and unaided recollection. As to the other difficulty of the witness, it removes itself. It only proves that he did not subscribe the instrument at the time it was dated; for it is physically impossible that in 1802, the testator, or anybody else, could have counterfeited or imitated a hand which had no existence until some time in 1805. But were it not for these two circumstances, which ought to have no weight, this witness would believe his name to the will to be in his handwriting, for he says: "If it had been cut out of the will, so as to separate it from these circumstances, he would have thought it was his handwriting." I then think the testimony of this witness himself would have authorized the verdict of the jury, as it regards him. But the testimony of the witnesses already mentioned proves satisfactorily his handwriting; I therefore think as it regards Jacob and Lewis Breaker the verdict ought to stand.

But I have come to a different conclusion as to Platt. He admits that his name is in a handwriting like his, but this is in itself no admission that it is identical, and he couples it with a positive and emphatic declaration that it is not his handwriting. There is no other testimony in the case which speak of this fact, except the probate of the will by the ordinary, the declaration of Jacob Breaker, as testified by Keckley, the testimony of Mr. Hume that the ordinary propounded to Jacob Breaker the question whether the other witnesses subscribed the will, etc., and the impression of Keckley, that the testator told him the two Breakers and Platt were the witnesses to his will. The declarations at any other time, whether on oath or otherwise, of a witness who is sworn in a cause, cannot be evidence but to affect his credibility, either to sustain or impeach it. Now, Jacob

Breaker has said nothing at all on the fact of Platt's handwriting, except that he does not know it, and his credibility on that point is out of the question, and the testimony is relevant. I confess it is very extraordinary that Jacob Breaker should not know the handwriting of one so nearly connected with him in the charities of life, as his sister's husband, who had stood in that relation to him for a number of years, with whom he had transacted business, and from whom he had taken receipts; who lived in the same neighborhood as himself for some years, and sometimes in his house; with whom he was in habits of brotherly intercourse while they were together, and probably in habits of correspondence when they were separated. I say it is to me extraordinary, and almost incredible, that he should not have known Platt's handwriting; but he swears he does not. There is then no proof of Platt's signature but his own recognition of its resemblance to his handwriting, of which I have already spoken, and the declarations of the testator, according to the impressions of Major Keckley, that Platt was one of the witnesses to his will.

This last circumstance is in the nature of circumstantial evidence to prove the fact, but it is so vaguely recollected that it must be considered as a very slight proof, and if one ground of objections to the will can be conceived to be at all credible, viz., that the testator had counterfeited the signatures of the persons who appear on the will as witnesses, it would be no proof at all. I do not consider it, however, in that light, but I think it not enough to have authorized the verdict of the jury. We have no reason to believe that better testimony could have been produced. We are obliged to suppose, until the contrary shall be made to appear, that evidence of this witness' handwriting, if it be his, was attainable. This testimony is never dispensed with in analogous cases when it is attainable: Phillips, 362, 363, 364; Roberts on Wills, 188; *Bishop v. Burton*, 2 Comyns, 614, and cases cited *supra*.

And when we consider that the object of the statute was not to require that degree of evidence which may satisfy the mind in a particular case, but that degree of evidence which would have a general operation in the prevention of frauds, there is reason for as close an adherence to its provisions as shall be conveniently practicable. I incline to think, therefore, until it be shown to be unattainable, proof of the handwriting of Platt ought to be required. But whether this shall be deemed indispensable or not, I think it is at least fit that the proof should

be sent to another jury, that it may be distinctly submitted to them to consider whether the evidence on this point proves the due execution of the will under the statute, separated in their minds from the question, on which there can be no doubt, whether this instrument was *bona fide* executed by the testator as his will.

On the second point it is clear, and has been repeatedly decided, and is now settled, that the objection comes too late after the verdict. No opinion is given on the validity of the objection, if it had been made in time.

On the first ground I am of opinion a new trial ought to be granted, and this is the unanimous opinion of the court.

PROOF OF WILL.—On this subject see *Jackson v. Van Dusen*, 4 Am. Dec. 330; *Jackson v. Le Grange*, 10 Id. 237; *Burwell v. Corbin*, Id. 494, and note; see, also, *Lindsay v. McCormack*, ante, 387, and note.

SHARPE v. BINGLEY.

[1 MILL, 373.]

PROOF OF PROTEST.—The clerk of a deceased notary produced the notarial record, and was permitted to testify that from the proceedings in the book and the habits of the officer in setting down the initials of the clerks, he (the clerk) must have served the notice of non-payment.

RELEASE OF INDORSER.—Receiving partial payments from the maker, granting him extensions of time, and promising him not to call on the indorser will release the latter.

ASSUMPSIT against the indorser of a note. The defense was laches in giving notice of non-payment, and afterwards in giving time to the maker and accepting partial payments from him upon a promise not to look to the indorser until the maker became insolvent.

It appeared that the notary who protested the note was dead; but his clerk produced the book in which the notary's proceedings were recorded, and swore from those proceedings and from the habit of the office in affixing the initials of the name of the clerk who served the notice, that he was certain that he, the witness, served the notice of non-payment in this case, though he had no present recollection of the fact, and after looking at the book attentively he said he would undertake to swear that he served the notice.

It further appeared from the testimony of the maker, who had

taken the benefit of the insolvent act, and been released by the defendant, that he had made sundry payments to the plaintiff after the note fell due, and that the plaintiff gave him further time to make other payments, and promised not to look to the indorser, and that he did not call upon the indorser until the maker became insolvent.

The judge instructed the jury that the proof of notice was sufficient, and that the indorser's liability being thus fixed, time afterwards given to the maker, or partial payments accepted from him, would not discharge the indorser. Verdict for the plaintiff for the balance due. Motion for a new trial: 1. Because the proof of notice was insufficient; 2. Because the judge instructed the jury as to the effect of the extension of time and the receiving of the partial payments.

K. L. Simons, for the motion.

Winstanley, contra.

By Court, BAY, J. 1. Upon this ground, I am of opinion that the same principles that were laid down in *Moodie and Morral's case* will apply in the present one; and that the presiding judge very properly decided that the notice proved by the clerk of the notary (who had lately departed this life), was good and legal notice.

2. Upon the second ground, I am obliged to differ from him in opinion, and am inclined to think he has laid the law too rigidly against indorsers, in the present instance. The same grounds were taken exactly in the case of *Moodie and Morral* which have been taken here, and the opinion of the majority of the court in that case was that giving day for payment and taking a new security exonerated the indorser; and in the present case, giving a new credit for nearly four years, till the drawer became insolvent, and receiving two partial payments from the drawer, with a promise not to look to the indorser, completely exonerated the defendant. Nay, I am induced to believe that this is still a stronger case than the other in favor of the indorser; for here there was an express engagement on the part of the holder, in consideration of the partial payments, not to look to the indorser; and I would beg leave to ask, is there any good reason to say that a man shall not be bound by his contract in a case of this kind, as well as in every other case of contract? I confess I can see none. There is still a further ground in this case which did not appear in the case of *Moodie*

and Morrall, and that is, that the holder, in this case, received two partial payments at more than the distance of twelve months from each other, which was taking upon himself to give the whole credit to the drawer of the note. In 2 Str. 745, it is laid down, that if a part of the note is received of the drawer, it is giving the whole credit to the drawer, and absolutely discharges the indorser, so that he cannot be resorted to for the rest. The same doctrine is laid down in 1 Mill, 48; that is, if the indorser receives part of the money upon a note of the drawer, he takes upon himself to give credit for the whole to the drawer, and it discharges the indorser absolutely. This last ground, however, appears to be doubtful; for although the authorities therein referred to are express and positive, yet later authorities lay down the law otherwise, and that receipt of part from the drawer will not exonerate the indorser, when no further day is given for payment. For all these reasons, I am of opinion that the verdict should be set aside, and a new trial granted.

NOTT, COLOOCK, and CHEVES, JJ., concurred in the opinion that a new trial should be granted, because there was evidence which should have gone to the jury of a new credit to the maker.

JOHNSON, J. I am opposed to the motion on the ground that there was not any evidence of a legal indulgence to the maker.

AS TO RELEASE OF THE INDORSER, by extending the time or giving new credit, to the drawer, see *Scarborough v. Harris*, 1 Am. Dec. 609. Time given to an accommodation indorser does not release the drawer, see *Bank of Montgomery v. Walker*, 11 Id. 709, and note.

STATE BANK v. JOHNSON.

[1 MILL, 404.]

EVIDENCE—ENTRIES IN BOOKS.—In an action against the surety of the teller of a bank, the entries made by the latter in a book kept by him in the bank, are evidence against the surety.

ADMISSIONS BY AGENT, after he has ceased to act as such, are not evidence against his principal.

EVIDENCE AGAINST SURETY.—Admissions of the teller of a bank, made after he had ceased to act as such, are not evidence against his surety.

DEBT on a bond signed by the defendant, as surety for one Webb, as teller in the State Bank.

It appeared from a book, in Webb's handwriting, in which he stated daily his account with the bank, and which was kept in the regular course of business, that on June 19, 1810, he had in his hands, as teller, of bank bills, gold and silver, etc., belonging to the bank, the sum of twenty-five thousand seven hundred and one dollars and six cents; that on the next day, his cash was counted and found deficient; that he was immediately suspended and soon afterwards dismissed; credit being voluntarily given for such sums as he was entitled to have credited at the time of dismissal, which reduced the balance on this account to one thousand seven hundred and thirty-six dollars and twenty-two cents. The plaintiffs further proved, that during the year 1810, the said Webb received sundry sums for the bank, amounting in the aggregate to six hundred and forty-three dollars, which he had omitted to enter, and also that he had overpaid the sum of one hundred dollars on a certain check. They, therefore, claimed a verdict for two thousand four hundred and seventy-nine dollars and twenty-two cents. There was some evidence tending to show that Webb was deficient in his money account, as teller, before the defendant became his surety, although no deficiency had been discovered by the directors when his cash was counted at certain stated times each year.

In the course of the trial, the plaintiffs offered a certain written acknowledgment made by Webb, after his dismissal, to prove that his deficiency was one thousand seven hundred and thirty-six dollars and twenty-two cents, but the evidence was rejected. The defendant offered an affidavit, made by Webb, to the effect, that his deficiency, or part of it, occurred before the defendant became his surety, but this was also rejected.

The defendant claimed that the plaintiffs having admitted that the bank was not entitled to judgment for the full sum of twenty-five thousand seven hundred and one dollars and six cents, could recover only for such items of the balance as were specifically proved. The presiding judge was of the same opinion, and so instructed the jury. Verdict for the plaintiffs for six hundred and forty-three dollars, with interest. Motion for a new trial by the plaintiffs, on the ground: 1. That having proved twenty-five thousand seven hundred and one dollars and six cents in the hands of Webb, on June 19, 1810, they were entitled to a verdict for any sum within that amount not exceeding the penalty of the bond, without further proof; and, 2. That Webb's acknowledgment, after he ceased to be teller, should have been received in evidence.

Prioleau, for the motion.

Richardson, *contra*.

By Court, CHEVES, J. The book of the teller, kept in his own handwriting, was the very best evidence which could possibly have been adduced, to charge him, as well as the defendant, who, as his surety, had engaged to be accountable for his acts. It is, at least, equivalent to a receipt of the same date, acknowledging that he had received so much money, which he was to apply in the course of his duty, and to account for. It is indeed much better evidence than a receipt, because it is more certainly accurate. It is made up and examined daily. It has a reference to the preceding day's account, and to the leading transactions of the day, and the face of it would show the error if any existed. It is then not only an acknowledgment of the receipt of so much money by Webb, but a proof beyond that acknowledgment that he had so much money. If he had not, it could only happen by deceptions arts on his part since the last quarterly day of counting, on which day he must have exhibited to the committee of directors the sum which this book on that day exhibits, in the species of bills and money which it states. It is in my mind impossible to imagine proof more satisfactory. It was urged in argument, that the deficiency might have happened before the defendant became the surety of Webb; but this was fully answered by saying that, as just mentioned, he must, not more than three months before that time, when the committee of directors counted his cash, have exhibited to them all the money which the state of his accounts called for, and beyond this they could not, and were not bound to, carry their vigilance. If his receipt for so much money delivered by the cashier on that had been produced, the bank would certainly have been entitled to a verdict for any sum within that amount (not exceeding the penalty of the bond), unless the defendant discharged himself. Because they did not claim the whole, it certainly would not have followed that they were entitled to no part of it, unless they proved over again, to the extent of the sum which they claimed, what they had proved before.

I think, if the nature of the subject be considered, it will clearly appear further proof could not possibly have been produced. The subject-matter was an account, consisting of debits and credits. The plaintiff was bound to prove the debits and the defendants the credits, except so far as they were admitted. Now in this case the debits consisted of the very items which were proved by the teller's book, and no change of circum-

stances in which they can be placed can make them any other. The specific items were all proved; they consisted of the bills of this bank, and of the other bank, and of gold and silver coin, in the several sums, and to the gross amount stated in the book, which were in Webb's hands on the commencement of that day. How then is it possible, in the nature of things, to give evidence of any other items imperishable and unchangeable; truth forbids it.

If any proof of the particular credits were necessary, it could only be when denied by the plaintiff, and then it would be incumbent on the defendant. But of what these credits consisted, there is no manner of doubt. The teller did not make up his accounts on the day of his dismissal, and the credits, no doubt, consisted of one or both of the following particulars, viz., a balance of moneys paid him in the transactions of the day beyond the receipts of the day, and of the money in his till when he was suspended.

The acknowledgment of the defendant, after his dismissal was, in my opinion, very properly rejected. The defendant agreed to be bound by the acts of Webb in the discharge of his duties as teller, and, therefore, his acts while teller were evidence to bind him, but this acknowledgment was not in his character as teller, and therefore did not bind him. No analogy can be stronger than that between an agent and his principal, and the parties in this case. The agent has authority to bind the principal, while acting as agent, by his acts, but never by his declarations, except as they form a part of the *res gestæ*. This they cannot be, after the agent has ceased to act under the authority of the principal. This doctrine has been very fully and clearly settled: Phillips on Ev. 74, 75, 76; 4 Taunt. 511, 519, 663. On the point of admissibility of this acknowledgment, there is a diversity of opinion among the members of the bench. My brothers, Nott and Colcock, concur with me. My brothers, Bay and Johnson, are of a different opinion.

On the first ground, then, I am of opinion a new trial ought to be granted.

BAY, NOTT, and JOHNSON, JJ., concurred.

COLCOCK, J., dissented.

ADMISSIONS BY AGENT.—As to the effect of admissions by an agent as against his principal, see *Mather v. Phelps*, 1 Am. Dec. 65.

ADMISSIONS BY PRINCIPAL AGAINST SURETY.—Upon this subject, see *Republica v. Davis*, 2 Am. Dec. 366.

COURSE v. PRINCE.

[1 MULL., 416.]

ACTION BETWEEN PARTNERS.—Unless there is a settlement and an express promise to pay, one partner cannot maintain an action at law against the other.

ASSUMPSIT. Verdict for the plaintiff. Motion for a new trial. The case is stated in the opinion.

Prioleau, for the motion.

Grimke and Richardson, *contra*.

By Court, NORT, J. This was an action of *assumpsit* for the price of certain articles furnished, and money advanced to the plaintiff, in aid of the ferry establishment, and the hire of the negroes which were the subject of the suit last disposed of, and the decision in that case would be conclusive in this, were it not for one distinguishing feature attempted to be shown in this case, to give jurisdiction to the court. It is contended that a settlement took place between the parties, that a balance was struck, which was acknowledged by the defendant, and a promise made by him to pay it. But the testimony did not establish that fact. The witness said that the defendant put down, in writing, what he acknowledged to be due, but he objected to the mode of making the calculation. He refused to give his bond for it, and never did promise to pay. In order to give one partner an action against another at law, there must be an express promise to pay: *Chitty on Pleadings*, 125; 2 *Cai.* 297; 2 *T. R.* 483. The mere acknowledgment of a copartnership debt is not sufficient, there might be counterclaims, that would much diminish or sweep it all away. The plaintiff himself could not have considered the settlement conclusive. For by that settlement, the negroes for which he has since brought an action, and recovered a verdict, were to have become the property of the defendant. That action, therefore, repels the idea of any contract on which this could be predicated. There are other strong reasons for granting a new trial in this case, but it is unnecessary to go into them. For, having determined that there was no promise to pay a specific sum, the same legal objections arises in this that arose in the last case, and it must have the same fate. A new trial must be granted.

ACTIONS BETWEEN PARTNERS.—It is a general rule, founded on most substantial grounds, that one partner cannot sue another at law for any matter growing out of the partnership, except in an action of account for a final

settlement. The reason is, briefly, that until all the affairs of the partnership are adjusted, there can be no adjudication of the complete right of the parties as to any single transaction connected therewith. The court cannot do full justice between the litigants until an account is taken: *Parsons on Part.*, 268 *et seq.* Equity alone can furnish a complete and adequate remedy: *Id.* 269.

DISTINCT DEMANDS.—There is nothing in the rule to prevent one partner from suing another upon a demand distinct from the partnership, for as to such demands they are not partners: *Parsons on Part.*, 270. One partner may sue another at law if the cause of action was never connected with the concern, or has been completely separated by explicit acts, or if the partnership is confined to a single transaction: *Lawrence v. Clark*, 9 Dana, 257. If the demand, even though it relates in some measure to partnership matters, is yet so specific and distinct that the right to recover cannot in any event be affected by the state of the partnership accounts, it is suable at law. Thus an action of damages will lie when it does not involve any inquiry into the affairs of the firm: *Wills v. Simmonds*, 15 N. Y. Sup. Ct. (8 Hun) 189. So an action lies for an agreed price of certain partnership stock: *Edens v. Williams*, 36 Ill. 252. So upon an express promise to furnish a given amount of capital or to pay for particular articles: *Collamer v. Foster*, 26 Vt. 757; *Wills v. Simmonds*, 51 How. Pr. 48. And on an express promise to pay half of a specific sum required for a certain joint adventure: *Morgan v. Nimes*, 54 Miss. 308. So, on a promissory note executed by one or more of the partners to a copartner: *Bonnafee v. Fenner*, 14 Miss. (6 S. & M.) 212; *Wright v. Jacobs*, 61 Mo. 19; although the note is given in payment for partnership stock: *Scott v. Campbell*, 30 Ala. 729; or is given for the use of the firm: *Anderdson v. Robertson*, 32 Miss. 241. And one item may be separated from the rest of the partnership transactions and adjusted independently so as to support an action: *Byrd v. Fox*, 8 Mo. 574; *Gibson v. Moore*, 6 N. H. 547; *Holyoke v. Mayo*, 60 Me. 385; *Neil v. Greenleaf*, 26 Ohio St. 567. So an action will lie on a note given on a partial settlement: *Sturges v. Swift*, 32 Miss. 239. For other instances: See *Parsons on Part.*, 270 *et seq.* and cases cited.

ACTIONS ON FINAL SETTLEMENT.—"There are no cases in which an action at law by partner against partner is maintained, so numerous or diversified as those which are founded upon the striking of a balance. There is much conflict and uncertainty among them, most of which, we think, might have been avoided by a distinct recollection of the reasons and principles obviously applicable to such cases. The general rule is, that a partner may sue at law a partner on a promise to pay a balance which has been struck and agreed upon:" *Parsons on Part.* 278, and cases cited. The principal controversy is upon the point whether, in case of a settlement and final balance, an express promise to pay such balance is necessary to maintain the action. An express promise to pay is held necessary in *Moravia v. Levy*, 2 T. R. 483, and *Fromont v. Coupland*, 2 Bing. 170, and there are decisions to the same effect in several of the American states. This is the doctrine in South Carolina, as established in the principal case. So in New York: *Murray v. Bogert*, 7 Am. Dec. 466; *Halsted v. Schmelzel*, 17 Johns. 80; *Westerlo v. Evertson*, 1 Wend. 532; *Clark v. Dibble*, 16 Id. 601; in Illinois, *Davenport v. Gear*, 2 Scam. 495; *Chadsey v. Harrison*, 11 Ill. 151; *Burns v. Nottingham*, 60 Id. 561. It seems to have been so held, also, in New Jersey: *Gulick v. Gulick*, 14 N. J. L. (2 Green) 578; Arkansas, *Bailey v. Starke*, 6 Ark. 191; and New Hampshire, *Nims v. Bigelow*, 44 N. H. 376; and in one case in Pennsylvania, *Killam v. Preston*, 4 Watts & S. 14. The weight of authority in that state

however, is in favor of the more reasonable doctrine that where there has been a settlement, and an ascertained balance an implied promise to pay it is sufficient, particularly where there is a partnership only as to a single adventure: *Ozeas v. Johnson*, 1 Binn. 191; *Walker v. Long*, 2 P. A. Browne, 125, *Van Amringe v. Ellmaker*, 4 Pa. St. 281; *Wright v. Cumpsty*, 41 Id. 102.

GENERAL DOCTRINE, EXPRESS PROMISE UNNECESSARY.—The doctrine supported by the weight of authority, as well as by the better reason is that no express promise is necessary where there has been a settlement and a balance struck. Says Maule B., in *Wray v. Milestone*, 5 Mees. & W. 21: "I know of no rule of law which requires, in this or in any other case, an express promise. The law requires a promise, which may be collected, sometimes from an expression in words, sometimes from other matters. Sometimes an account is so stated as, in itself, to import no promise, then a subsequent promise in words supplies the legal promise stated in the declaration. Here it is clear that the statement of the account itself imported a promise to pay the items included in it." The statement of account in that case was: "Fifteen pounds due from me to Mr. Wray," signed by the defendant. Among the decisions holding that, in such cases a promise may be implied from a final settlement, and a balance struck, and that an action will lie thereon are the following: *Rackstraw v. Imber*, Holt, N. P. 368; *Beach v. Hotchkiss*, 2 Conn. 425; *Lamalere v. Caze*, 1 Wash. C. C. 435; *McColl v. Oliver*, 1 Stew. 510; *Calvert v. Marlow*, 6 Ala. 337; *Pope v. Randolph*, 13 Id. 14; *Spear v. Newell*, 13 Vt. 288; *Dana v. Barrett*, 3 J. J. Marsh. 8; *Wycoff v. Purnell*, 10 Iowa, 332; *Hunt v. Morris*, 44 Miss. 314; and see *Holyoke v. Mayo*, 50 Me. 385. In Georgia an action at law will lie between partners without any express promise, and even without any balance struck, if the plaintiff can show the affairs of the concern so far settled that the jury can ascertain the amount due him: *Pool v. Perdue*, 44 Ga. 454. Indeed the disability of partners to sue each other at law seems to be almost entirely removed by statute in that state: *Goodson v. Cooley*, 19 Ga. 599; *Wadley v. Jones*, 55 Id. 329.

THE MASSACHUSETTS DOCTRINE on this subject, as established by a long course of decisions, is exceptionally liberal. It is thus stated by Morton J., in *Williams v. Henshaw*, 11 Pick. 79, after commenting on the principal case, and some others holding the same view: "In this state the doctrine is carried still farther, and neither the settlement of the accounts by the partners, nor an express promise to pay, is necessary. It has been held too often now to be questioned, that assumpsit will lie to recover a final balance of a partnership account, and that this extends to all cases in which the rendition of the judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them: *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, Id. 540; *Bond v. Hays*, 12 Id. 34; *Wilby v. Phinney*, 15 Id. 116; *Fanning v. Chadwick*, 3 Pick. 420; *Brinley v. Kupfer*, 6 Id. 179. This rule is not only founded on authority, but is reasonable in principle and convenient in practice." See to the same effect, *Sykes v. Work*, 6 Gray, 433; *Wheeler v. Wheeler*, 111 Mass. 247; *Dickinson v. Granger*, 18 Pick. 315. But one partner cannot, after the action is commenced, assume the outstanding liabilities and allow all outstanding claims due the firm to be valid and collectible, for the purpose of avoiding the necessity of a final settlement: *Williams v. Henshaw*, 12 Pick. 378.

For other cases where actions at law between partners have been sustained, see *McSherry v. Brooks*, 46 Md. 103; *Wells v. Carpenter*, 65 Ill. 447; *Rockwell v. Wilder*, 4 Met. 556. See also *Kennedy v. McFadden*, 5 Am. Dec. 434; *Duncan v. Lyon*, 8 Id. 513.

WADE v. COLVERT.

[2 MILL, 27.]

INTOXICATION will avoid a contract; if it is so extreme that the party sought to be charged was incapable of clearly perceiving or assenting.

FRAUDULENT TRANSFER.—A transfer of all his property without consideration, made by one who is much in debt, is fraudulent.

TROVER by the assignees in bankruptcy of Tutt against Colvert. The action was to recover the value of certain cattle and hogs which the defendant claimed Tutt had sold to him by a bill of sale dated March 20, 1812. The articles had been demanded of Colvert by the then sheriff, in May, 1812, under an authority from Tutt, but he refused to deliver them. At the time of this demand the articles were all the property in the state belonging to Tutt who was then much in debt, and who since then had left the state.

The bill of sale was produced in evidence. It recited no consideration as originally drawn, but it had been altered, and a consideration inserted in such a manner as to excite suspicion that it might have been done after its execution. No consideration was satisfactorily proved. The subscribing witness testified that he did not see Tutt sign, but that Tutt had acknowledged the signature as his; that at the time of this acknowledgment Tutt was too much intoxicated to do business, and that he was *non compos mentis*, and had been in the same condition for some days before. The debt under which the plaintiffs claimed was due by Tutt at the time the bill of sale was executed.

Verdict for the defendant, and motion for a new trial on the grounds: 1. That the bill of sale was fraudulently obtained and void, as well between the parties as against creditors; 2. That the property in the plaintiff and the conversion by the defendant were clearly proved, and that the verdict was against law and evidence.

By Court, CHEVES, J. 1. The execution of this bill of sale was not such as to make it legally valid as between parties. Intoxication will not be allowed to exonerate a man from his contracts, though it may be such as to lead him into imprudent and disadvantageous engagements; his liability must be the penalty of his vice. Were it otherwise, drunkenness would be the cloak of fraud; but were it such as not to leave men the power of distinctly perceiving and assenting, they cannot be bound, because the very essence of a contract is the assent of the con-

tractor to what he may be presumed to understand. Tutt, in this case, from the testimony of the subscribing witness, appeared to be in a state which left him incapable of knowing what he did, and scarcely in a state of consciousness. No man can, under such circumstances, bind himself; he cannot assent. This bill of sale, if these facts are to be believed, never had existence. It was, *ipso facto*, void. The transaction, too, has many of the leading badges of fraud as against creditors. It was of all the debtor's property which his creditors could reach. It appeared to be without consideration, and it was made when the debtor was much indebted. I think the evidence on this ground required a verdict for the plaintiffs; but on the ground of the invalid execution of the deed I am clear there ought to be a new trial.

2. The second ground stated in the brief does not present so good a case for the plaintiffs, and is almost sufficient to deny them the benefit of a motion for a new trial. The conversion proved was previous to the commencement of the plaintiffs' title. A conversion is in its nature a tort: 2 Esp. N. P. 199; and if the right founded on it be transmissible, it can hardly be contended that it vested in the plaintiffs by virtue of the assignment of the insolvent debtor's estate. It will probably be perilous for the plaintiffs to rest their action again on the proof of a conversion which was given at the trial, which is now the subject of review. I am, however, of opinion, a new trial ought to be granted, for the reasons before assigned.

GRIMKE, NOTT, COLCOCK, GANTT, and JOHNSON, JJ., concurred.

INTOXICATION DOES NOT PER SE render a contract void, but voidable merely: Story on Contracts, sec. 87; *Broadwater v. Darne*, 10 Mo. 277; *Joest v. Williams*, 42 Ind. 365; *Bates v. Ball*, 72 Ill. 108. Such, also, is the rule laid down in *Matthews v. Baxter*, L. R. 8 Ex. 132, an action for the breach of a contract in not completing the purchase of houses and land bought of the plaintiff at a sale by auction. To the plea of complete intoxication at the time of making the alleged contract, the plaintiff replied a ratification after the defendant became sober. The cause was submitted on a joinder in demurrer to this replication. The barons delivered their opinions *seriatim*. Kelly, C. B.: "I am of opinion that our judgment must be for the plaintiff. It has been argued that a contract made by a person who was in the position of the defendant was absolutely void. But it is difficult to understand this contention. For surely the defendant upon coming to his senses, might have said to the plaintiff, 'true, I was drunk when I made this contract, but still I mean, now that I am sober, to hold you to it.' And if the defendant could say this, there must be a reciprocal right in the other party. The contract cannot be voidable only as regards one party, but void as regards the other; and if the drunken man, upon coming to his senses,

ratifies the contract, I think he is bound by it." Martin, B., said: "I am of the same opinion. The judges in *Gore v. Gibson* use the word 'void,' it is true, but I cannot think that they meant absolutely void. They simply meant to say that a drunken man's contract could not be enforced against his will. But it by no means follows that it is incapable of ratification. The case is an authority that this plea is good, but no authority for holding the replication bad. I think that a drunken man when he recovers his senses, might insist on the fulfillment of his bargain, and therefore that he can ratify it, so as to bind himself to a performance of it." Pigott and Pollock, Barons, also expressed themselves of the opinion that the contract of a drunken man is voidable and not void.

THE DEGREE OF DRUNKENNESS necessary to avoid a contract is stated in *Bates v. Ball*, 72 Ill. 108, to be as follows: "To render the transaction voidable he [who sets up intoxication as a defense] should have been so drunk as to have drowned reason, memory and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being, especially as there is no pretense that any person connected with the transaction aided in or procured his drunkenness. The rule has never, so far as our knowledge extends, been announced that mere drunkenness is sufficient to release a party from his contracts." To avoid liability upon a contract on the ground of intoxication, the party must produce clear and satisfactory proof that he was at the time in such a state of drunkenness as not to know what he was doing: *Johns v. Fritchey*, 39 Md. 258. It is total drunkenness that is admitted to be a defense to a contract in *Gore v. Gibson*, 13 Mees. & W. 625. But evidence of a party's condition several hours after the settlement sought to be set aside on the ground of intoxication was admitted as tending to show his condition at the time when the settlement was made: *Phelan v. Gardner*, 43 Cal. 306. And evidence proving that a party could remember on the following morning the fact of having entered into a contract the day before, was regarded as a failure to prove such "complete drunkenness" as is necessary to support the defense of intoxication: *Caulkins v. Fry*, 35 Conn. 170. Not only is this defense available to the party himself, but it may also be relied upon by his personal representatives: *Wigglesworth v. Steers*, 3 Am. Dec. 602.

IMPLIED CONTRACTS.—There is a class of contracts from which a party cannot be released even by the plea and proof of complete drunkenness at the time they were entered into. This class embraces those transactions where the law raises the assent essential to their execution. The distinction is clearly drawn by Pollock, C. B., in *Gore v. Gibson*, 13 Mees. & W. 623, 625, the leading English decision upon this subject: "With regard, however, to contracts which it is sought to avoid on the ground of intoxication there is a distinction between express and implied contracts. Where the right of action is grounded upon a specific, distinct contract, requiring the assent of both parties and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties but implies a contract from the circumstances, in fact the law itself makes the contract for the parties. Thus in actions for money had and received to the plaintiff's use, or paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail." Story on Contracts, sec. 86, asserts this principle.

RELIEF IN EQUITY.—"Courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition. It is upon this special ground that courts of equity have acted in cases where a broader principle has sometimes been supposed to have been upheld. They have indeed, indirectly by refusing relief, sustained agreements which have been fairly entered into, although the party was intoxicated at the time. And especially they have refused relief where the agreement was to settle a family dispute, and was in itself reasonable. But they have not gone the length of giving a positive sanction to such agreements so entered into by enforcing them against the party or in any other manner than by refusing to interfere in his favor against them." Story's Eq. Juris., secs. 231, 232.

PROCURING ANOTHER'S INTOXICATION.—As was intimated in the foregoing extract from Story's Equity Jurisprudence, contracts made by one while intoxicated at the procurement of the other contracting party, or those made with one who has taken advantage of the intoxication of the other, although not brought about by his design will be relieved against on the ground of fraud. And in such cases the degree of intoxication need not be so great as where one sets up his voluntary drunkenness as a defense: *Hotchkiss v. Fortson*, 7 Yerg. 67; *Harvey v. Peaks*, 1 Munf. 519; *Dunn v. Amos*, 14 Wisc. 106; 1 Parsons on Contr. 384, note; *Warnock v. Campbell*, 10 N. J. E. 485; *O'Connor v. Remy*, 29 Id. 156.

INTOXICATION OF MAKER OF NOTE.—As between the maker and payee of a negotiable note, the rules heretofore stated as to the effect upon his contract of the intoxication of a party apply. The maker may avoid the note if he can show his total drunkenness at the time of its execution: *Gore v. Gibson*, 13 Mees. & W. 623; *State Bank v. McCoy*, 69 Penn. St. 204. The defense of complete intoxication may also be set up against those taking the note with a knowledge of the circumstances under which it was made: *Id.* But where the rights of an innocent indorsee for value and without notice intervene, a different rule should prevail. The courts recognize the justice of the claim of such an indorsee, but are not uniform in stating the principle applicable to his situation. Some of the cases make a distinction between the total and partial intoxication of the maker at the time he executed the note, and hold, if it appear that the mind of the maker was completely overpowered by liquor, so that he could not give any assent, that then the note is void even in the hands of a *bona fide* indorsee in the ordinary course of business, otherwise not. This view is adopted by Daniel on Neg. Inst., vol. 1, p. 187; and, it would seem, by *Miller v. Finley*, 26 Mich. 249.

The position taken in *State Bank v. McCoy*, 69 Penn. St. 206, on the contrary, that the defense of total drunkenness cannot be set up by the maker against the innocent holder of a negotiable note, is, it is conceived, and for the reasons there advanced, the soundest. Judge Williams spoke for the court, and in the course of his opinion, said: "The note of an insane person or of one perfectly imbecile, which he has been induced to sign by fraud and imposition, is void in the hands of an innocent indorsee; it does not follow that a note given by a person in a state of intoxication is void in the hands of a holder for value without notice of the maker's condition when it was given. There is this difference between the cases. Insanity or total imbe-

cility is a permanent state or condition of the mind, disabling one from taking care of himself. Drunkenness is a temporary disability voluntarily produced. * * * And when men thus temporarily deprive themselves of the use of their reason, and voluntarily expose themselves to fraud and imposition, the law may wisely refuse to treat them with the same tenderness that it does those unfortunate beings who are deprived of their understanding by some providential dispensation; and it may properly hold them to a different measure of responsibility for the consequences of their acts. If a man voluntarily deprives himself of the use of his reason by strong drink, why should he not be responsible to an innocent party for the acts which he performs when in that condition? It seems to me that he ought, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. * * * But there is another and controlling reason for holding the maker liable to the indorsee in such case, founded on principles of public policy and the necessities of commerce. The exigencies of trade require that there should be no unnecessary impediments to the ready circulation and currency of negotiable paper, but that it should be left free to pass from hand to hand like bank notes, and perform the functions of money untrammelled by any equities or defenses between the original parties. If then it should be held that the drunkenness of the maker avoids his note in the hands of the indorsee, it is obvious that such a rule would greatly clog and embarrass the circulation of commercial paper, for no man could safely take it without ascertaining the condition of the maker or drawer when it was given, although there might be nothing suspicious in its appearance, or unusual in the character of the signature. It is evident that it would be a less evil to exclude the defense of drunkenness, though it might occasionally work individual hardship, than to clog the circulation of commercial paper to the great inconvenience of the public, by admitting such a defense. If fraud and imposition in obtaining a note will not avoid it in the hands of an innocent indorsee, because such a rule would render commercial paper less valuable and convenient as a medium of exchange, why should the drunkenness of the maker? Why should drunkenness be a defense if there has been no fraud or imposition? And if there has, and this is the ground of the defense, why should it not avoid the note in the one case as well as in the other?"

PEAY v. BRIGGS.

[2 MULL. 93.]

METES AND BOUNDS.—In a purchase of land by metes and bounds, purporting to contain a specified number of acres, more or less, the metes and bounds, and not the number of acres, control.

VISIBLE BOUNDARIES.—When the metes and bounds are represented by visible marked lines, they cannot be extended, although a natural or artificial boundary is called for beyond.

ASSUMPSIT on a promissory note, the consideration for a tract of land sold by the plaintiff's testator to the defendant. The latter claimed a deduction for a deficiency in the number of

acres. The testator sold and warranted "a tract of land containing in the whole eight hundred and forty-six acres, more or less, situated and lying on the waters of Colonel's creek, adjoining lands belonging to Darling Jones, James Bryant and Isaac Knighton, on the west side of the Waterie river, originally granted to Minor Winn and Robert Martin; and hath such boundaries, form, and marks, as will more fully appear by the plats," etc. When this deed was executed the original plat annexed to the grant, and a resurvey afterwards made, were exhibited to the defendant, and were the plats referred to in the deed. The certificate describes the land as being bounded on the south-east by Stephen Harman's, Isaac Knighton's, and Darling Jones's land, and the names of the two former were written on that side of the plat, as owning lands there. The plaintiff's grant was found on a resurvey to contain eleven hundred and sixty-five acres, and a tract of one hundred and eighty-seven acres within the lines of the grant was found to be embraced in Knighton's grant. But deducting the one hundred and eighty-seven acres, defendant has a greater number than he bargained for. One of the corners of the land sold to defendant extended to the exterior line of Knighton's survey.

The questions raised were: 1. Whether the defendant's claim should be limited to the number of acres expressed in his deed, or whether it should extend to the boundaries called for? 2. If to the extent of his boundaries, whether Knighton's land, which was inclosed, should be considered one of the boundaries of the land conveyed? or, 3. Whether he should go to the metes and bounds exhibited by the plat.

CHEVES J., before whom the cause was tried, was of opinion that Knighton's tract should be considered a boundary, and that no deduction from the purchase-money should be made. Verdict for the whole demand, and motion for a new trial.

By Court, Nott, J. The principle heretofore established by the decisions of this court is, that where a person purchases land by metes and bounds represented to contain a certain number of acres, "more or less," he is entitled to recover all the lands within the prescribed limits, whatever the number of acres may be. It must be apparent from the words "more or less," that the metes and bounds are to govern, and not the number of acres. That question was settled in the case of *Vaughn v. Mitchell*, determined in this court, I think, about the year 1803. In that case, about fifty acres of the land were

taken off by an older grant, still the defendant had nearly double the number of acres that his deed called for; yet the court held that he was entitled to all the land embraced within the lines of the plat referred to, and allowed a deduction from his bond for the deficiency.

2. The plaintiff's deed calls for Knighton's land as a boundary. He must have intended, therefore, to represent it as lying without his lines, and not within the heart of the land. For by no construction can a tract of land be said to be bounded by lands actually inclosed within it. It is true, one corner of the plaintiff's survey does extend to the outer line of Knighton's tract; but it is a mere mathematical point; the latter is completely circumscribed by the former. It is another established rule of law, that where the metes and bounds of a tract of land are represented by visible marked lines, they cannot be extended beyond those lines, although a natural or artificial boundary may be called for beyond them. And by a reference to plaintiff's original grant, or to the resurvey exhibited at the time the deed was executed, it will appear that the lines and corners on the side towards Knighton's land are distinctly marked.

3. It follows, then, that the defendant is entitled to hold all the land included in the plat referred to in the deed, according to the metes and bounds there set out. The correctness of this conclusion is more apparent from the plat itself, where Knighton's land is represented on another part of the land, and as being actually without the lines; so that the land now called Knighton's, cannot be the land called for in the deed. And a deed is always to be taken most strongly against the person who makes it.

I am of opinion the defendant was entitled to a deduction for the value of the land contained in Knighton's grant, and therefore a new trial must be granted.

GRIMKE, COLCOCK, and JOHNSON, JJ., concurred.

CHEVES, J., dissented.

Upon the effect of the words "more or less," in a deed of conveyance, see *Dale v. Smith*, ante, 64, and note. See, also, *Bryan v. Beckley*, ante, 276, as to boundaries referred to in a deed.

BRIGGS v. STARKE.

[2 MLL, 111.]

STATUTE OF LIMITATIONS—NEW PROMISE, made by one of several executors, takes the case out of the statute.

ASSUMPSIT. Plea, the statute of limitations; and reply, promise of one of the defendants, executors of Starke, to pay the debt.

Verdict for the plaintiff.

By Court, NORT, J. A motion is made to set aside the verdict in this case, on the ground "that the promise of one executor is not sufficient to take a demand out of the statute of limitations, nor to prevent it from running against it."

Where several are bound, jointly and severally, in a note or other undertaking, if a joint action is brought against all, and they plead the statute of limitations, proof of a promise by one within six years will support the action, notwithstanding it was formerly held otherwise: 1 Esp. 150; *Whitcomb v. Whiting*, Doug. 629. The same principle will apply to executors. The statute of frauds exempts them from liability on any promise to pay out of their own estates, unless the promise is in writing. But that statute does not embrace this case. It is to be inferred, therefore, that in other cases their promises shall bind them; otherwise the statute was unnecessary. The motion for a new trial must be refused.

GRIMKE, COLCOCK, CHEVES, and JOHNSON, JJ., concurred.

GANTT, J., dissented.

EXECUTOR'S POWER TO REVIVE DEBT.—Upon the power of an executor or an administrator to revive a debt due from the decedent which was barred by the statute of limitations in his life-time, the decisions are not uniform. The states wherein the courts have maintained that the power so to receive a debt does exist are: Massachusetts, *Brown v. Anderson*, 13 Mass. 201; *Manson v. Felton*, 13 Pick. 206; *Lamson v. Schutt*, 4 Allen, 360; *Foster v. Starkey*, 12 Cush. 324; *Fisher v. Metcalf*, 7 Allen, 209; Kentucky, *Hord v. Lee*, 4 Mon. 36; *Northcut v. Wilkinson*, 12 B. Mon. 408; New Jersey, *Shreve v. Joyce*, 36 N. J. 44; North Carolina, *Cobham v. Administrators*, 2 Am. Dec. 612; and it seems in New Hampshire, *Buswell v. Roby*, 3 N. H. 458; *Hodgson v. White*, 11 Id. 211; *Brewster v. Brewster*, 52 Id. 52. On the other hand, states whose courts have denied to executors and to administrators this power are: Connecticut, *Peck v. Botsford*, 7 Conn. 172; *Isaacs v. Stevens*, 13 Id. 506; Kansas, *Hanson v. Towle*, 19 Kan. 273; Louisiana, *Sevier v. Gordon*, 21 La. Ann. 373; Mississippi, *Sanders v. Robertson*, 23 Miss. 389; *Huntington v. Bobbitt*, 46 Id. 528; Missouri, *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; Ohio, *Drouillard v. Wilson*, 10 W. L. J. 385; Pennsylvania, *Fritz v. Thomas*,

1 Whart. 66; *Clark v. Maguire*, 35 Penn. St. 259; Texas, *Moore v. Hardison*, 10 Tex. 467; *Moore v. Hillebrant*, 14 Id. 312; Virginia, *Fisher v. Duncan*, 3 Am. Dec. 605; *Seig v. Acord*, 21 Gratt. 365, 371; and, it seems, New York, *Bloodgood v. Bruen*, 8 N. Y. 370; *McLaren v. McMartin*, 36 Id. 88; *Heath v. Grinell*, 61 Barb. 189. In other of the states the question has not been judicially determined, the courts merely asserting what must be the nature of the promise in order to revive the debt. Such is the case with Maine: *Oakes v. Mitchell*, 15 Me. 360; *Bunker v. Athearn*, 35 Id. 364; and South Carolina, *Johnson v. Ballard*, 11 Rich. 181; *Wilson v. Wilson*, 1 McMullan's Eq. 331; *Clarke v. Jenkins*, 3 Rich. 340; although in *Reigne v. Desportes*, 1 Dudley, 118, 121, it is said that if the statute had barred the debt in the testator's life-time, the new promise of the executor, made as such, would not be binding.

THE PREVAILING DOCTRINE, it is seen, is that an executor or administrator cannot, even by an express promise to pay, revive a debt which had been barred by the statute of limitations during the life-time of the decedent. The reasons for this rule are differently stated. Some of the cases proceed upon the ground, as taken in *Drouillard v. Wilson*, 10 W. L. J. 385, where it is said that "the duties of the administrator are limited to collecting the debts due to, and to the payment of those owing by, the intestate. What right he has to be generous with the property of others, to pay debts for which there exists no legal liability against the estate, I could never comprehend." It is also urged in support of the rule, that the statute extinguishes the debt, that the new promise is a new contract, supported by the moral obligation arising from the original contract, that in the case of an executor there is no such moral obligation, and therefore that he cannot bind the estate by a new promise. Still other decisions turn upon the construction of the local statutes.

The contrary doctrine is based by some of the decisions which support it, upon the assumption that an administrator or executor represents the decedent to the extent of the assets in his hands, and that a promise made by him in his representative capacity to pay a debt should have the same effect as if it had been made by the decedent himself: *Northcut v. Wilkinson*, 12 B. Mon. 408. The early Massachusetts cases were led to take this view of the question, because they considered the statute of limitations to be a mere statute of presumption, and therefore that an acknowledgment by a personal representative of the justness of a barred debt would make the debt a legal claim against the estate: *Brown v. Anderson*, 13 Mass. 201. Subsequent adjudications in that state upon this question have not repudiated the reasoning of the former decisions. But in *Foster v. Starkey*, 12 Cush. 324, still another *ratio decidendi* was adopted, founded upon the construction of their local statutes, and in an application of the principles of the general statute of limitations as evidenced by the practice in that state. "The practice uniformly is to declare upon the original cause of action, and if the statute of limitations is set up as a bar, then the plaintiffs offer evidence of the payment, promise or unequivocal acknowledgment of the debt, the effect of which is to avoid the bar, and the recovery is had on the original cause. Such being the effect of the payment or acknowledgment, there seems no reason why it should not have the same effect when made by the personal representative of the debtor, who has full knowledge of the affairs of the estate, and a full legal control and disposing power over the same as if made by the debtor himself. It is equally proof that the debt is due and unpaid, and remains in force."

A PROMISE BY ONE OF TWO or more executors, to pay a barred debt, is regarded in those states that concede the power to the personal representative to revive the debt, to be as effectual as a promise by all the executors: *Shreve v. Joyce*, 36 N. J. L. 44; *Northcut v. Wilkinson*, 12 B. Mon. 408; *Tobham v. Administrators*, 2 Am. Dec. 612.

AN ACKNOWLEDGMENT OF THE DEBT is sufficient to take the debt out of the statute, although made by the executor or personal representative: *Hord v. Lee*, 4 Mon. 36; *Brown v. Anderson*, 13 Mass. 201; *Manson v. Felton*, 13 Pick. 206; *Lamson v. Schutt*, 4 Allen, 359; and so, also, is a part payment: *Foster v. Starkey*, 12 Cush. 324; *Fisher v. Metcalf*, 7 Allen, 209. But in South Carolina and in Maine, it is affirmed that nothing but an express promise will revive the debt: *Oakes v. Mitchell*, 15 Me. 360; *Wilson v. Wilson*, 1 McMullan's Eq. 331.

WHERE THE DEBT IS NOT BARRED at the time of the decedent's death a promise by the executor or administrator to pay such claim, will furnish a new period from which the statute is to run. This principle is generally admitted, even in those states which deny to the personal representative the power to revive a debt; as a still existing demand upon the estate is such a legal charge as the executor or administrator is empowered to recognize and pay: *Bishop v. Harrison*, 2 Leigh, 532; *Seigh v. Acord*, 21 Gratt. 365, 370; *Heath v. Grinell*, 61 Barb. 189; *McLaren v. Martin*, 36 N. Y. 88; *Crawford v. Childress*, 23 La. Ann. 184; *Walker v. Cruikshank*, Id. 252; *Succession of Romero*, 29 Id. 493; *Griffin v. The Justices*, 17 Ga. 96.

THE SPECIAL STATUTE LIMITING THE TIME within which an action must be brought against the executor in his official capacity must be pleaded by him; nor can he by any promise or acknowledgment take a case without the provisions of the act: 3 Williams on Ex., sec. 1803, note q., 6 Am. ed.

DAVIS v. MURRAY.

[2 MLL, 143.]

SHERIFF'S SALES, CAVEAT EMPTOR is the rule; there is no warranty.

NOTICE OF SALE may be waived by the defendant where there are no legal liens on the property.

ASSUMPSIT for money had and received, alleged to have been paid by the plaintiff for a negro sold at sheriff's sale under an execution levied upon the property of the defendant. The negro was afflicted with the dropsy, which fact the defendant concealed from the plaintiff, who returned the negro as soon as his true condition was discovered. SMITH, J., nonsuited the plaintiff. Motion to set aside this nonsuit.

By Court, CHEVES, J. The law is settled that sheriff's sales are coupled with no implied warranties: 2 Bay, 169. I do not mean to say that a sheriff's sale may not be made the instrument of a fraud, which will entitle the person deceived to a

remedy against the authors of it, nor do I mean to say, whether the case stated would or would not constitute such a case. If the plaintiff has any remedy, the question must be tried in an action of deceit, and not in the present form of action, which can only be maintained where the contract is wholly and clearly rescinded. It has been contended that this was not a sheriff's sale; but the court has no doubt on the point. Where there are no legal liens on the property, it is the privilege of the defendant to waive the advertisement required by law for his benefit. At least it is the privilege of the plaintiff and defendant in the suit in which the execution issues to do so; and it seems, they did waive it in this case. There was no other omission of the forms of a regular sheriff's sale; and we, of course, deem this sale regular. Such sales are very frequent, and often produce beneficial effects without impairing legal obligations.

GRIMKE, BAY, NOTT, COLCOCK, and JOHNSON, JJ., concurred.

That *caveat emptor* is the rule at sheriff's sale, see *Friedly v. Scheetz*, 11 Am. Dec. 691, and note, 699.

That notice of sale under an execution may be waived by the judgment-debtor, see *Shamburger v. Kennedy*, 1 Dev. 1; *Munger v. Fletcher*, 2 Vt. 524; *Burroughs v. Wright*, 16 Id. 619, 624.

STATE v. BURKET.

[2 MILL, 155.]

PUTTING A PRISONER ON HIS TRIAL.—If, after swearing certain jurors, it is found that the remainder cannot be procured, the prisoner is not so put upon his trial as to be entitled to his discharge.

MOTION for the discharge of the prisoners indicted for horse-stealing. It appeared that the prisoners had been arraigned, had pleaded not guilty, and the panel called. Of this panel but eight jurors were accepted, twenty having been peremptorily challenged by the prisoners, one challenged by them for cause, and one having been challenged by the state for cause. The court then ordered a sufficient number of talesmen to be called to complete the jury, but on opening the box, it was found to contain no list of talesmen; whereupon the jurors sworn were discharged against the prisoners' consent. The present motion was then made on the ground of this discharge.

By Court JOHNSON, J. The ground taken as well as the arguments and authorities offered in its support, are predicated on

the mistaken supposition that the trial had been entered into, or, in the words of the brief, that the prisoners had been put on their trial. At what particular period, in the progress of the arraignment and other formalities usual, and perhaps necessary, preparatory to a trial, the trial may be said to be entered into, or at which it may be said the prisoner is put on his trial, may be a question of some nicety, and it appears to me to be wholly unnecessary to consider it here; for it must appear evident, that a prisoner cannot be put on his trial, unless he is before a court in every respect competent to try the offense with which he is charged. How is the fact in this case? One of the members of the court, indispensably necessary to the trial of this offense, a jury, was wanting. To constitute a jury, every lawyer knows that twelve lawful men are necessary, and that without this number no jury can exist; the eight sworn, although they constituted so many constituent parts, were not a jury, and, therefore, were incompetent to pronounce a verdict; and for the reasons stated, it was impossible to supply the deficiency. The prisoners could not, therefore, be said to have been put on their trial, and consequently are not entitled to the benefit of the rule insisted on in their behalf.

BAY, NOTT, COLCOCK, GANTT, and CHEVES, JJ., concurred.

See a similar decision, *State v. Moor*, *ante*, 541, and note.

HUGHES v. CREYON.

[2 M^{ILL}, 257.]

PROMISE TO PAY THE DEBT OF ANOTHER.—The signing of articles of separation is a sufficient consideration to support the promise to pay the debt of another.

ASSUMPSIT on the promise to pay to the plaintiff the board furnished by him to two young ladies, children of plaintiff's wife by a former husband, in consideration of plaintiff's signing certain articles of separation.

Verdict for the plaintiff; and motion for a new trial, on the ground of damages found beyond the amount claimed, of want of evidence to prove a consideration for the promise, and of insufficiency of the consideration to take the case out of the statute of frauds.

By Court, GANTT, J. The first ground must necessarily fail; the plaintiff having by his counsel consented to release so much

of the recovery had as shall exceed the account for board, as exhibited by plaintiff.

On the second ground, I am of opinion that there was sufficient evidence of a consideration to support the promise. Was it nothing that the plaintiff was to forego the society and pleasure of the conjugal state? That he was no longer to have the control and authority of a husband over the person of his wife? Nothing that this sacred tie, which in law identified them as one person, was, by the articles of separation, to become sundered, and he deprived of the better part of himself? Nothing to drag through life, solitary and comfortless, without a partner to share in his joys and sympathize with him in his hours of affliction? Nay, more, perhaps the current of his life blood to dry up, and no means left him whereby to transmit his name to posterity? These are weighty and important considerations, and are deemed quite sufficient to support the promise upon which this action was founded.

From this view of the privation and losses which the plaintiff has and may sustain, I have no hesitation in saying that the third ground taken for a nonsuit cannot be supported, being clearly of opinion that the signing of the articles of separation by the plaintiff at the instance of the defendant, and on his promise to pay the board on that condition, is quite sufficient to take the case out of the statute of frauds. Lord Eldon, in the case of *Houlditch v. Milne*, 3 Esp. N. P. 86, says that there may be cases where, though it is clearly the debt of another, yet a note in writing is not necessary: See 2 Selw. N. P., note 7, p. 858. The reason which governed the decisions in the cases there put exists in a much greater degree in the present; and leads me to the conclusion that the promise made by the defendant in this case is one not within the statute of frauds, and that he is bound to fulfill it. The verdict must stand, the plaintiff releasing so much thereof as exceeds the account for board filed by him.

GRIMKE, COLCOCK, and CHEVES, JJ., concurred.

JOHNSON, J. I concur in this case. From the report of the case, I did not understand that the question of separation formed the basis of a consideration that had been before agreed upon; but the signing of articles by which the pecuniary interest of the plaintiff was affected, was the ground of the promise.

NORR, J., dissented.

ADAMSON v. SMITH.

[2 MILL, 269.]

STATUTE OF LIMITATIONS—SUSPENSION BY DISABILITY.—When the statute once begins to run, neither insanity nor any other supervening disability arrests its progress.

ASSUMPSIT on a promissory note by the administrator of William Adamson. Pleas, non-assumpsit, and non-assumpsit within four years. It appeared that upwards of four years had elapsed from the maturity of the note to the time of Adamson's death, but that he was sane during one year and five months of that period, and was insane the remainder thereof. Evidence of payment was also produced. The presiding judge charged the jury that the evidence was insufficient to authorize the presumption of payment, and that the running of the statute of limitations was stopped by the subsequent disability of the intestate. Verdict for the plaintiff, and motion for a new trial.

By Court, CHEVES, J. In this case it is necessary to state what are the grounds of this motion, for they are stated so generally in the brief and notice as not to present the nature of them distinctly. The grounds are: 1. That the presiding judge misdirected the jury, in charging them that there was no sufficient evidence on which to presume the payment of the note by Kirkpatrick, and also in charging them that although the statute of limitations had commenced its operation before the insanity of the payee, its operation ceased on the occurrence of that event; 2. That the evidence authorized the presumption of payment; 3. That the statute having commenced its operation was not suspended by the supervening disability of the payee.

1. The presiding judge did no more than state to the jury the impression of his mind as to the presumption of payment, and it is the duty of a judge to do so when he thinks the nature of a case requires it, and then fairly submitted the question to them for their decision. In this there could be no misdirection. The correctness or incorrectness of his charge on the plea of the statute will be considered when we come to that point. If the law be otherwise, the verdict would be, of course, set aside though he had charged differently. On this point, therefore the charge of the judge is immaterial.

2. On the evidence of the presumption of payment I concur, from the view which I am enabled to take of the testimony,

with the presiding judge; but if I did not, it was a question of fact fairly submitted to the jury, and unless the evidence were very strongly against their verdict, I should not be disposed to disturb it.

3. The next ground is one of much more importance and difficulty. There are no questions of more importance, I think none of so much, as those under the statutes of limitation. They are statutes of peace and repose, necessary for the comfort of society. They are found in some shape or other in every country, and under every government; their adoption is scarcely a matter of choice. If the positive enactments of the legislature do not put a limit to the time within which claims shall be made, that time results from the rules of evidence, and the law presumes that the claim which has been for a great length of time forborne does not exist. Time, with its long train of inevitable and incidental auxiliaries, destroys the muniments of rights, and the evidences of acquittances, and those statutes and legal presumptions which perpetuate their effect are indispensable. They are great national monuments of right and security; they may sometimes do partial injustice, but without them how much more injustice would be done? How many titles would be defeated? Nay, how few could be established? How many incautious persons would be defrauded? How many estates of deceased persons ruined by unfounded claims? The balance is infinite in their favor. It is extraordinary, then, that they should be viewed by jealousy; and, by great strictness in their construction, be limited in their beneficial effects. Those statutes have, on one point or other, been continually the subject of judicial doubt and investigation for the last fifteen years in our courts, and yet, I do verily believe every point which had been agitated had been settled, and wisely settled, a century before. The unhappy fact that our judicial decisions are not regularly published is the great cause of this fluctuating state of our laws, an evil that I do fervently hope the legislature will not fail to remedy as soon as possible. I feel confident that the point before us had been settled by the universal acquiescence of the bench and the bar, the legislature and the country, for more than a century. We adopted the policy of the English statutes; they are of force in our statute books, except as they are altered by our own acts. These have made little alteration, except in the periods of limitation. The provisions of the English statutes have been re-enacted almost in their very terms, and we have habitually resorted to the decisions in

the English books, on their statutes for the construction of our own, and they ought to be considered as affording the just construction of them in reason and principle, unless a manifest difference be shown, not in the unessential letter, but in the context, substance, object and policy of the law. The decisions in the English books have considered it as a principle pervading the whole of the provisions of their statutes, that when the time begins to run no supervening disability shall arrest its progress. Their courts have declined to discriminate between the different phraseology of the different provisions or statutes on the subject, wisely concluding that as they were in principle the same any construction put "on one would equally affect the others:" *Ramington*, 61.

And this conclusion has been pressed upon the court in the argument of this case. It has been argued, and I think fairly, that in principle there is no difference between this case and that of *Rose v. Daniel*, decided in this court. I admit it. There may be a verbal difference, but I can see none in principle; none in the substance of the several provisions of the act. In that case it was determined, that though the statute had begun to run against the ancestor, upon his death, leaving heirs in minority, it not only ceased to operate, but all its past operation had become a nullity; that it was to begin again, as if the action had then first accrued, and, in effect, that more was to extend to the heir than the ancestor himself at the time of his death. The effect of that decision will be to deprive this greatly beneficial statute of more than half its usefulness, by depriving it of all its certainty. A different construction was strongly urged by the peculiar circumstances of our country. What may have been merely right in England, became here almost indispensable and essential. In England there is but a single heir; he is the first born, and, therefore, usually of age at the death of his parent. Here a descent is scarcely cast where infancy does not occur. If the ancestor attain to advanced age, he leaves grandchildren, who take, and are in a state of infancy. If he die in early life, his own children are in that state. The inheritance descends on all lineal descendants. If there are no lineal descendants, then on all collaterals—the issue of collaterals who are dead taking in the place of the parents. I mention these particulars to show how numerous those are who generally inherit, and how very frequent cases of minority must be. Then by another decision of this court: If a minor be entitled to the smallest portion of the inheritance, though those

who are entitled to the rest be of full age, the statute has no operation to any part. Combine the effect of these decisions and what becomes of the object and policy of this great statute? Will it be "a statute of repose," as it has been happily called? Of how little value it will be is well illustrated by the facts of the case of *Rose v. Daniel* itself. In that case there had been a possession of upwards of thirty years, with very little interruption, if any; the land had passed from purchaser to purchaser, and no search could have apprised them of the existence of the claim of the plaintiffs (unless by intuition they could have discovered the existence of the grant under which the plaintiffs claim), and this forgotten and derelict title turns the vigilant innocent purchaser out of possession, and sends him for reimbursement, perhaps, to an insolvent or distributed estate.

The statute was relied upon no doubt as a security against all such dormant claims, but under this construction it is not worth a straw. Enough has been said to furnish my reasons for saying that I think the principle of *Rose v. Daniel* is dangerous, and ought not to be extended; and although I think that in fair analogy the decision in that case ought to govern this, yet as it does not bind me as direct and obligatory authority on the point before me, I cannot consent to allow it that influence on my mind. Besides that decision goes on the ground that the peculiar phraseology of the clause on which it was founded distinguished it from the other cases of disability for which the statute provides; and although I cannot admit that there is any material distinction even in the words, yet the ground of the decision serves to relieve me from its authority in this case. I may add that the words of the act in the clause which relates to this case are so very plain and explicit as to leave no possible doubt. They are, that if the person shall, at the time of such right of claim of cause of action given or accrued, be *non compos mentis*, etc. When, then, did the cause of action in this case accrue? When the note became due. Was then the payee at that time *non compos mentis*? He was not; and, therefore, clearly the saving of the act does not apply to the case. The pleadings are not before the court. It will be observed that the state of them, as given in the brief, does not present the point argued and decided in relation to the question of disability; the replication is stated to be that the payee was *non compos mentis* at the time the action accrued. But I have presumed this recital of the pleadings to be a mistake, and only now mention it that it may not be the

ground of misconception hereafter. I am of opinion that the plea of non-assumpsit within four years was a bar to the action, notwithstanding the disability of the payee, as that disability was subsequent to the accruing of the action, and that on that ground a new trial ought to be granted.

GRIMKE, NOTT, and JOHNSON, JJ., concurred.

GANTT, J., delivered a dissenting opinion.

That the statute of limitations is not suspended by any legal disability after it has once commenced to run, see *Fitzhugh v. Anderson*, 3 Am. Dec. 625; *Jackson v. Moore*, 7 Id. 398; *Demarest v. Wynkoop*, 8 Id. 487; *Faysouz v. Prather*, 9 Id. 691; *Thompson v. Smith*, 10 Id. 453, and note.

CUSACK v. WHITE.

[2 MLL., 279.]

CONSIDERATION.—A deed, from the solemnity of the seal, is presumed to be upon a good consideration.

DEED TO A WIFE is good unless the husband dissented. His assent may be presumed where the deed is clearly for her benefit.

FUTURE COHABITATION.—A contract made in consideration of future illicit cohabitation is void.

PAST COHABITATION, though illicit, is a good consideration for a deed or bond.

CONSIDERATION, PRESUMPTION OF.—The consideration of a deed, although the grantor and grantee were living in adultery will be presumed to be good.

TROVER for a negro girl. The wife of Cusack was formerly the wife of one Pilkerton who left her more than twenty years before this action was commenced. Sometime after his departure Daniel White executed a deed of gift of the negro girl to Mrs. Cusack. Evidence was offered to prove cohabitation between White and Mrs. Cusack, who lived with her little children alone near White, and that the gift of the negro was in consideration of such cohabitation. Verdict for the plaintiff, and motion for a new trial.

By Court, NOTT, J. 1. The first ground taken for a new trial in this case is, that there is no evidence of a conversion. But as that ground has not been insisted on in that argument, I presume it may be considered as abandoned; 2. The second is, that the deed under which the plaintiffs claimed was not supported by any legal consideration. The deed purports to be "in consideration of love and good will," and for diverse other

good considerations. Judge Blackstone says that every deed, from the solemnity of the seal, is presumed to be for a good consideration, and admitting that love and good will are not a good consideration for a conveyance to a stranger, yet as these words express nothing immoral, the deed may be considered as voluntary and good between the parties; 3. The third ground which I shall consider, though not the third in the order of the brief, is that the assent of the husband cannot be presumed, and without it the deed conveyed nothing to the wife. The deed to the wife was good, unless the husband dissented; but if his assent was necessary, it will be presumed in a case so much for her benefit. But from the situation of these parties, it is unnecessary to consider that question, as will appear from the view taken of the next ground, to wit, that if the deed had any effect, it vested the property in the husband, and not in the wife. This may be a question of some importance, though perhaps not necessary to be decided in this place. Judge Reeve, in his treatise on Domestic Relations, says, that personal chattels accruing to the wife during coverture, vest immediately in the husband, and to this effect quotes 1 Com. Dig. 555; Reeve, 61.

This learned author, however, admits that there are authorities which hold that the right is not vested in the husband, until he has reduced the goods into possession, and acknowledges that the latter is the established doctrine of the court of equity, and that it still remains to be ascertained how the question will be ultimately settled by the courts of this country. He also says he is inclined to adopt the doctrine laid down by Comyn, because it preserves the symmetry of the law. But I should consider it one step gained towards preserving the symmetry of the law to effect an uniformity of decision between the courts of law and equity. And I am disposed to think that the prevailing opinion in this state, even in the courts of law, has been in conformity with the decisions of the courts of equity. It is not, however, necessary to determine the question in this case; for the husband, having deserted and abandoned his wife, may be considered, as it is expressed in England, as having abjured the realm; in which case the wife may be looked upon as a *feme-sole*. Indeed, from the length of time which he had been absent, and no certain accounts having been received of him from the time of his departure, the jury might fairly presume that he was dead at the time the deed was made: for he had then been absent, according to the testimony of one

witness, at least five or six years, and twenty-five or six when this action was tried. But the last and most important ground relied on is that the deed was founded on an immoral consideration, and therefore ought not to be supported in a court of law. The consideration here spoken of is cohabitation with the plaintiff's wife, then Mrs. Pilkerton. This fact is inferred from the consideration expressed in the deed, "love and good-will," while she was still the wife of another man. But I can easily suppose a person may entertain such a friendship, or love and good-will, for a married woman, and particularly one abandoned and forsaken, as this unfortunate woman was, as to induce him to give her a small portion of his property, without considering it as irresistible evidence of illegitimate love; and much less would I consider such an expression by an ignorant man, who perhaps thought it necessary to express some consideration, sufficient to destroy the reputation of a virtuous woman. For whatever might have been the real character of this woman, I think we are bound to suppose her such, while we are considering the subject with reference to the deed only; and I do not think a contrary presumption is very much strengthened by the extrinsic evidence.

Mrs. Pilkerton says Daniel White used to visit Mrs. Cusack (then Mrs. Pilkerton), but she does not know the object of his visits. Drury Pilkerton says that White desired him to ask her if she would receive his visits; he did so, and she did not object; that is, she made no reply. The testimony of the first witness proves nothing; that of the second but little; if it proves anything, it is so extraordinary that I think it not entitled to much weight. If Mrs. Pilkerton had been a notorious strumpet, there would have been no necessity for sending an ambassador to negotiate such a treaty. If she was a woman of previous good character, he would hardly have adopted that method to seduce her. But he does not explain for what purpose he wished to visit her; and after all, he only made the proposition, and she made no reply. I suppose he took silence for consent, and that is now to be received as plenary proof of an illicit intercourse between them. I do not feel authorized to give such a construction to the testimony.

But suppose the fact of cohabitation to be clearly proved, would the conclusion follow which has been drawn from it? In order to determine that question it is necessary to inquire what the common law was, and whether any, and what, alteration has been made by our act on the subject. The text on

which the whole doctrine contended for is predicated is, that *ex turpi contractu non oritur actio*. If we were now for the first time called upon to determine what degree of turpitude should render a contract void, and to settle all the distinctions to which such a maxim might give rise, we should have a task of no small difficulty to perform. But it appears to me that the law is so well settled there is little left for us to do. Whether wisely settled or not, is not for me to determine; the law must be our guide.

1. I take it to be clear law at this day that a contract made in consideration of future cohabitation is absolutely void: *Walker v. Perkins*, 3 Burr. 1568. The law will not permit a woman to make her virtue an article of merchandise. Such gross indecency and immorality contaminates the very source and foundation of the contract, and renders it void from the beginning. In the case of *Walker v. Perkins*, the consideration was expressed on the face of the deed. Whether it would be permitted to aver such a consideration contrary to the deed does not appear.

2. I take it to be as clearly settled, on the other hand, that where a bond or deed is given for past cohabitation, it is good: *Turner v. Vaughan*, 2 Wilson, 339. In that case, also, the consideration was expressed in the condition of the bond, and the judges all agreed that it was a good and meritorious consideration. The reason is, because where a woman has been seduced, her reputation destroyed, and herself exiled from the company and society of all the respectable part of the community, she is entitled to some compensation or reparation for the injury from the author of her ruin. She is not considered guiltless in a moral point of view; but the law will not on that account prohibit the person, who has caused or perhaps has only contributed to her misfortune, from doing her that justice to which he may consider her entitled. The turpitude is in the act, and not in the compensation.

3. But a third, and perhaps the most numerous class of cases is where a bond or other deed is given to a woman, while living in adultery with the man who makes the deed, without expressing the consideration for which it was given, or purporting to be for a good and valuable consideration. And here I think I may lay down another rule, that such a deed is always to be taken as good at law. For where a deed purports to be for a good consideration, the contrary is never to be presumed. The mere fact of living together would not prove that cohabitation

was the consideration; and if that fact was proved, it would still remain to be shown that it was for future cohabitation. Both these facts must be proved; they are not to be presumed. There is all the difference between a deed made during cohabitation and one made in consideration of future cohabitation that there is between a good and a void deed.

All the cases which have been relied on by the defendant's counsel are taken from the equity books; but sitting in a court of law we must be governed by the rule of law, and not of equity. The courts of equity have this advantage over a court of law, that although they recognize the rules before laid down, yet when a party comes into that court to enforce the specific performance of such a contract, they will be governed by the particular circumstances of the case; and in many cases where they will not lend their aid to carry the contract into effect, they will not set it aside. Yet the courts of equity, with the unlimited discretion they exercise, have never gone so far as is contended for in this case. Two great considerations with the courts of equity are: 1. Whether the cohabitation was with a married or a single man; 2. Whether the woman was previously virtuous, and had been seduced. The argument or reasoning in the court of equity is, if the cohabitation was with a single man, there is reason to presume the woman may have been seduced by a promise of marriage; but she can have no such expectation from a married man. If she was a common woman before the unlawful intercourse commenced, she has sustained no injury, and therefore is entitled to no reparation. But although these may be considerations with the courts of equity, they are not subjects of inquiry for courts of law; and even in the courts of equity, I believe I am authorized to say, these are only considerations by which their discretion will be directed, and not rules of law by which their decisions are always governed. In the case of *Lady Cox*, 3 P. Wms. 340, the master of the rolls said it was reasonable to presume the bond was given to induce her to continue to live with him; in which case it was worse than a voluntary bond. He therefore postponed it to simple contracts, debts, but he did not set it aside; and that was a bond given by a married man, and the woman knew it when the bond was given. In the case of the *Marchioness of Annandale v. Ann Harris*, 2 P. Wms. 432, where a bill was brought to have the bond delivered up, and where there was also a cross-bill for performance, the bond was decreed to be paid. Indeed, in none of the cases produced, even from

the equity books, have the bonds been decreed to be given up, or deeds set aside; but the courts have merely refused their aid to carry them into effect.

Having thus cursorily noticed the general rules by which courts of law and equity are governed in cases of this sort, let us now apply them to the case under consideration. The most that can be made of this case is, that the deed was made during cohabitation; but it was not proved to have been made in consideration of cohabitation. On the contrary, Pilkerton says, the proposition which he was authorized to make, and which laid the foundation for the criminal intercourse that afterwards took place, if it ever did exist, was some time after the deed was executed. No case can be found where such a deed, on such evidence, has been set aside or held void. I will not protract this opinion by pointing out the endless variety of cases where every principle of honor, law and morality requires such provision to be made for an unfortunate woman and more unfortunate offspring. But I will suppose a woman abandoned to vice, and reduced to the lowest degree of degradation; is she, on that account, to be abandoned to misery and distress; to be turned out upon the world, poor, wretched, and naked; to depend on charity, or the bounty of the state, for support? May not the author of her wretchedness, or he who has participated in her vices, relieve her from penury and want! Ought he not to be compelled to do it? And surely when he does voluntarily, what every person would say he was bound, by every principle of morality and religion to do, and what otherwise the state would perhaps be obliged to do, the law will not declare the act void. In equity, the previous character will be sometimes inquired into. But in the case of *Hill v. Spencer*, Amb. 641, Lord Camden said, there was no principle in equity which said a man may not give a voluntary bond to a common prostitute. The woman, in that case, was proved to have been a common prostitute for seven years before her acquaintance with the obligor, and continued so during her criminal intercourse with him; yet the lord chancellor would not relieve against the bond, nor order it to be given up. I think it results from all those cases, that without any discrimination, if there has been no fraud, the only case where such a bond or deed is held to be void at law, is where it is given for future cohabitation, and clearly proved to be so.

I have given this subject more attention than the particular case before us required, with a view to the construction of our

own act, which is now to be considered. And even that would not have rendered it necessary but for the opinion which it is said was advanced by the presiding judge in this case, and similar opinions by other members of this bench on a former occasion. For although there is no ground made in this case of misdirection, yet it is of the first importance that we avail ourselves of the earliest opportunity to reconsider opinions hastily delivered, and correct those which are calculated to mislead the public mind with regard to the law. It is said that the judge, on the circuit, instructed the jury, that the deed in question was void at common law; but that it was good under our act of assembly, which had in that respect repealed the common law. I hope I have satisfactorily shown that it was not void at common law, and I will now proceed to consider our act which is alluded to. The act is in these words: "If any person, who is an inhabitant of this state, or who has an estate therein, shall have already begotten, or shall hereafter beget, any bastard child or children, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and give, or settle, or convey, either in trust, or by direct conveyance, by deed of gift, legacy, devise, or by any other way or means whatsoever, for the use and benefit of said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater portion of the clear value of his estate, real or personal, after payment of his debts, than one fourth part thereof, such deed of gift, conveyance, legacy, or devise, made, or hereafter to be made, shall be, and the same is hereby declared to be null and void for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate:" 1 Brevard, 68.

I shall not consider this act as going to give validity to contracts bottomed on a base and immoral consideration, which were void at common law. But it certainly recognizes, in very strong and explicit language, the principles which I have been endeavoring to establish, that a bond or deed, given even by a married man to a woman with whom he is living in adultery, was not void at common law. It assumes the principle, that he had a right thus to dispose of his property, and goes to restrain the abuse of it. It is not the intention or the effect of the law to encourage vice and immorality, or to legalize corruption. It recognizes a right in every man, to make reparation to injured innocence, or injured reputation. It considers every man as a free agent, having the disposition of his own

property. It does not confer on married men the exclusive privilege of keeping mistresses. On the contrary, when one becomes so forgetful of the duty which he owes to himself, to society, and his family, it prohibits him from giving the whole of his property to such a woman, in exclusion of his wife and children, a privilege in which he was not restrained by the common law; and leaves him nevertheless to judge whether the object of his criminal intercourse ought not also to be the object of his bounty; and to determine, within certain restrictions, of the nature and extent of the compensation which she deserves. And although it will sometimes happen, that a portion of a man's property will be taken from a virtuous wife and an amiable family of children, to support a dissolute and profligate mistress, yet the rules of law must be uniform.

In this country, where divorces are not allowed for any cause whatever, we sometimes see men of excellent characters unfortunate in their marriages; and virtuous women abandoned, or driven away houseless by their husbands, who would be doomed to celibacy and solitude, if they did not form connections which the law does not allow, and who make excellent husbands and virtuous wives still. Yet they are considered as living in adultery, because a rigorous and unyielding law, from motives of policy alone, has ordained it so. The infinite variety of shades by which the different cases may be distinguished, renders it impossible to lay down any definite rules for considering them. In equity, from the peculiar construction of that court, perhaps some discrimination may be made; but I doubt very much whether greater justice will be done than at law. It is not because a woman has forsaken the paths of virtue that she is to be abandoned and forsaken. The first woman that was made, who came pure and spotless from her maker's hand, was the victim of seduction; but she was still provided for. And the law looks with that indulgence on the frailties of human nature, as not to consider every error an unpardonable crime.

I am of opinion a new trial ought not to be granted.

GRIMKE, COLCOCK, GANTT, CHEVES, and JOHNSON, JJ., concurred.

COHABITATION AS A CONSIDERATION.—The principal case was interpreted in *Singleton v. Bremer*, Harper, 201, 211, assumpsit on a promissory note, which the defendant alleged was given in consideration of cohabitation and void. In the opinion of the court, delivered by Judge Nott, the following language

is used: "This brings me to the consideration of the next ground, which is a supposed misdirection of the judge in instructing the jury that if they should be of opinion that the note was given in consideration of past cohabitation, the plaintiff was entitled to a verdict. The only cases that I can now recollect, either in this state or in England, where this question has been involved have arisen upon bonds or deeds wherein the consideration could not be inquired into, unless it could be shown to be unlawful; and, therefore, where a bond is given in consideration of past cohabitation, it is good, because where the consideration has been gratuitous the bond must be considered as voluntary. The English decisions upon the subject are considered, and seem to be recognized as correct in the case of *Cusack and wife v. White*, 2 Const. Dec. 279. The judge who delivered the opinion of the court in that case, speaking of the case of *Turner v. Vaughan*, 2 Wils. 339, which was an action on a bond, expressed on its face to be for past cohabitation, says the English judges held it to be a good and meritorious consideration. Perhaps that is rather too strong an expression, for although a person may be entitled to merit for making reparation for injured reputation, whether occasioned by seduction or otherwise, the act itself of unlawful cohabitation can never be considered meritorious. I presume, therefore, that past cohabitation under any circumstances, would not be considered as a consideration on which an action of assumpsit could be maintained without some written agreement; and it follows, from the principles above laid down, that the mere fact of reducing it to writing, or giving it the form of a promissory note, cannot make it so. When the consideration is gratuitous, a promise made afterwards must be considered as equally gratuitous and voluntary; and therefore it is must be optional with the party whether he will perform it or not. It is otherwise with bonds, which, though voluntary, must be supported in a court of law. Whether a promissory note given for the actual injury sustained in reputation by seduction, would be supported as bottomed on a good consideration, is a question which does not occur in this case; but I am satisfied that the note in question was given in consideration of cohabitation, though past it must be considered as voluntary, and the plaintiff's action must fail." And the growing opinion seems to be that past illicit cohabitation is not a good consideration for a promise: *Beaumont v. Reeves*, 55 E. C. L. R. 483; 1 Parsons on Cont., sec. 436; Smith on Cont., secs. 16 and 195. Contracts in consideration of future illicit cohabitation are invalid. Same citations, and *Walker v. Gregory*, 36 Ala. 180.

AYER v. WILSON.

[2 MLL, 219.]

JOINT CONTRACTORS.—If one joint contractor die, the survivors only can be sued at law; and when all have died, the action must be against the representative of the last survivor.

COVENANT against the personal representatives of Yarrington Buford, deceased, on a deed of bargain and sale, in which the decedent and one Mary Touchstone were jointly bound. The defendant pleaded the survivorship of Mary Touchstone. Judg-

ment was rendered for the plaintiff on a demurrer to this plea. Motion to reverse this judgment.

By Court, CHEVES, J. In the case of a joint contract, like the present, if one of the parties die, his executors or administrators are, at law, discharged from liability, and the survivor alone can be sued: 1 Chitty on Plead. 36; and in case the survivor be dead, his executor or administrator alone is to be sued: 1 Chitty on Plead. 37, 38. This point, which is very clear, according to the English books, has scarcely ever been questioned; and in the only case before the present in which I have known it to be questioned, it was recognized by this court: *Burwell, Boykin v. Administrators of Watson*. The only distinction between that case and the present is, that there the survivor was living; and here it is stated, though it does not appear from the pleadings, that she is dead; this difference in the state of the facts makes no difference in point of law; the cases are the same. It has been supposed, that there is no good reason for this rule of law. But if an adherence to the essential doctrines of actions and of pleadings, and the nature of the contract can furnish one, there is a very good reason for it.

Where persons contract jointly they must, if living, be sued jointly. This is the inevitable consequence of the nature of their contract. If one die, it must produce one of the following results: 1. The survivor and the representatives of the deceased must be joined. But independent of the objection that there might be no representative, this is impracticable, because the same judgment cannot be rendered against both. The judgment against the survivor would be *de bonis propriis*, and that against the representatives of the joint contractor *de bonis testatoris*: 1 Chitty on Plead. 37; 2. They must both be sued in separate actions, but that would be to make a new contract for the parties contrary to their stipulations; it would make it to all purposes a joint and several contract; 3. The representatives of the deceased contractor only must be sued in exclusion of the survivor; for this no plausible reason can be alleged. Or, lastly, the resort must be to the survivor exclusively; and this the law has with wisdom, I think, established. It makes the defendant liable for no more than his contract, which subjected him to the payment of the whole, if not aided, from any cause whatever, by his associate, and gives to the plaintiff that remedy which in general will be most for his advantage, and all that he contemplated when he entered into the contract; or

otherwise he would, as he might have done, have made it a joint and several contract. Besides, it is only a question of jurisdiction, for both the plaintiff and defendant have a remedy perfectly ample and precisely just, governed by the real equity of the case, in a court of equity, if the precise rules of law should not reach the justice of the case. If there be any hardship on any side, it is of the nature of those cases of hardship which form a great part of the jurisdiction of the court of equity. I am satisfied the law is as it ought to be. I think the motion ought to be granted.

GRIMKE, COLOOCK, NOTT, and JOHNSON, JJ., concurred.

REEVES v. BOOTH.

[2 MILL, 334.]

PAROL PROOF OF A WILL is admissible when the original is lost.

PARTITION of real estate. One of the defendants claimed under an alleged will of William Reeves, and offered parol evidence to prove that William made the will and stated on his death-bed that he had done so, although the same had been misplaced and could not be found when the testator called for it, and the testator died intending the instrument to be his will. This evidence was rejected, Smith, J., stating that the law presumed that the will had been revoked, and that the presumption could not be rebutted by parol. Partition as prayed for was ordered upon the return of a verdict for the plaintiff. Motion for new trial.

By Court, GANTT, J. The authority quoted on the trial of the case (Shep. Touch. 411) is in point to show that the parol proof ought to have been admitted. In Phillips on Ev. 378, in a note of a case taken from Cai. 363, it is said that where the original will is shown to be lost the next best evidence of its contents, as in the case of a deed, is admissible. From the combined force of these authorities, and the latitude allowed in all other cases, of admitting proof of the contents of a deed or other instrument, to be gone into when the original is proved to have been lost, I am of opinion the evidence offered in this case ought to have been received. The declarations of William Reeves on his death-bed, expressive of his belief of the exis-

tence of the will, and that it had been left in the hands of John McReary, Esq., who drew and was a subscribing witness thereto, if of sound mind at the time, would leave no doubt of the fact that he had not canceled it himself. If proof to the extent alleged could have been adduced on the trial, it would, in my opinion, have satisfactorily evinced the right of one of the defendants to the land devised to him; and the evidence having been offered and rejected as inadmissible, I think a new trial ought to be had.

GRIMKE, COLOOCK, NOTT, CHEVES, and JOHNSON. JJ., concurred.

See a similar decision, *Wilmot v. Talbot*, 1 Am. Dec. 374. The case of *Sugden v. Lord St. Leonards*, 1 P. D. 154, decided in 1876, in the court of appeals, furnishes a most interesting illustration of the application of the principles governing the admissibility of parol evidence to establish lost instruments. In that case the plaintiffs sought to prove the will of Baron St. Leonards upon the testimony of his daughter, Charlotte Sugden. She had seen the will for the last time in 1873, two years before her father's decease; but between that time and the date of its execution, in 1870, Lord St. Leonards himself had read it to her on one occasion, and she herself, at his request, had read it on three other occasions. Her veracity and honesty of purpose were admitted on both sides to be beyond all question, and although she was largely to be benefited by establishing the will, Chief Justice Cockburn said: "I am glad to think that it has not occurred to any one to say, or to suggest, that upon that ground Miss Sugden has intentionally departed one hair's breadth from the truth." What became of the lost instrument was not known. It had been kept in a private box on the first floor of the testator's residence, and the key locked in an *escritoire*, to which it was thought that Lord St. Leonards alone had access. On the trial it appeared that of the various keys in the house five of them could unlock the *escritoire*. This fact, together with the declarations of the testator while confined by his last sickness, were considered as rebutting the presumption of a destruction of the will with an intention to revoke it.

From the exhaustive opinions of the judges presiding in this case in its different stages, the following principles of law may be deduced: 1. The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence; and they may be proved by the testimony of a single witness, though interested, whose veracity and competency are unimpeached. 2. The declarations written or oral, made by a testator both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its execution. As to declaration made after the execution of the will, *Mellish*, L. J., dissented. 3. When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved.

CALDWELL v. ENEAS.

[2 MILL, 348.]

VOLUNTARY REPAIRS placed on the lands of another become a part of the realty, and cannot be removed.

ACTION to recover the value of certain planks which plaintiff had nailed down as the floor in a house belonging to the defendant. Defendant had permitted the plaintiff's mother to live in his house as long as she pleased, without rent, on condition that she would put it in good repair. After the plaintiff's mother had removed from the house, defendant took away the plank.

By Court, GRIMKE, J. I am of opinion the decree was wrong, for the contract to repair the house was with Mrs. Julian, and not with the plaintiff, her daughter; and if the daughter, who lived with the mother under the aforesaid agreement, chose to put any repairs upon the house, it must be at her own risk and charge; for instance, if one, seeing my fence down, chooses to repair it, without consulting me, he cannot afterwards, either charge me with it, or carry away such materials as were made there, and particularly if they were so fastened as to become part of the freehold. This was precisely the case here; and there must, therefore, be a reversal of the decree of the circuit court.

COLCOCK, NOTT, CHEVES, GANTT, and JOHNSON, JJ., concurred

AYER v. HAY.

[2 MILL, 365.]

ORIGINAL UNDERTAKING.—If one promises to pay for services to be done for another, this is an original undertaking.

ACTION to recover the sum of thirty dollars on the following letter: "I will raise the money by subscription if I can; and if not, I will pay it." This had been written on account of a poor, sick woman whom a doctor Bryan refused to attend, unless some person would become security for the above sum.

By Court, GRIMKE, J. The court below had, on the authority of *Stephen, Ramsay & Co. v. Winn*, nonsuited the plaintiff, considering it as a *nullum pactum*, being the assumption of one to pay the debt of another without any consideration. But, in my

opinion, this case is very distinguishable from that, inasmuch as that debt was due before the note was given, and there was no consideration whatever to the payee, who had undertaken to pay that debt. But in the present case no debt had yet been incurred when the defendant promised to pay the thirty dollars, and it was upon a good consideration, for the service had been proved to have been performed by the doctor. This therefore must be considered as an original undertaking on the part of the defendant, and for which he is liable; and to this point it is laid down in Cro. Eliz. 282, and 1 Gould's Esp. 188, that where the service had been done at the request of another, it shall be good to support this case. I am, therefore, in favor of a new trial.

COLOOCK, NOTT, CHEVES, GANTT, and JOHNSON, JJ., concurred.

DAVIS v. CRAWFORD.

[2 MILL. 401.]

ACTION ON CONTRACT.—One who is ready and offers to perform his part of a contract, may maintain an action against the other contractor who refuses to permit the contract to be performed.

ACTION on the case for a breach of contract. Plaintiff alleged that he had been hired by the defendant to haul two thousand five hundred weight of cotton from Lancaster district to Richmond, at five dollars per hundred-weight; that plaintiff had started upon his journey, but was overtaken and stopped by the defendant, who wholly prevented a compliance with the contract on the plaintiff's part. The contract of hiring was proved, but the amount of cotton to be hauled was not. It also appeared, that while the plaintiff was loading the cotton upon his wagon at the defendant's house, the news of peace was received; whereupon the defendant refused to send the cotton. Defendant moved for a nonsuit on the ground that the allegations of the declaration were not proved as laid. The motion was overruled and a verdict returned for the plaintiff. A motion was then made to set aside the verdict and for leave to enter up judgment on a nonsuit.

By Court, GANTT, J. This was a special action on the case for an injury which the plaintiff sustained, by a breach of con-

tract, entered into between him and the defendant. Had the contract been fulfilled on the part of the plaintiff, and the action had been brought for the wages to which the plaintiff might have entitled himself by an inland waggage to Richmond, there might, in such case, have been some little plausibility in the first ground as stated; but even in that case, it would have been considered as an immaterial variance, as the cotton to be carried was to be paid for at the rate of so much per hundred. There were mutual promises; the plaintiff, on his part, agreed to carry a load of cotton from Lancaster to Richmond, the defendant agreed to pay him for this service at the rate of five dollars per hundred. The plaintiff made the necessary preparations for the journey, did actually take in a part of the load, when the defendant discharged him, refusing to fulfill his part of the contract or agreement. The law says that in such a case, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part of the agreement: Doug. 684.

As to the second ground, the facts stated to have been immaterial and unnecessary, as charged in the declaration, appear to me to have been otherwise. They were substantially proven on the trial, and furnished the basis upon which the action on the case was bottomed. Upon the whole, I am of opinion that the defendant may think himself fortunate in having so easily gotten rid of this losing bargain. I am of opinion that he has not the shadow of pretense for bringing this appeal.

The presiding judge took a very correct view of the case and properly overruled the motion for a nonsuit; and I am equally decided that his appeal to this court should be also overruled.

GRIMKE, COLOCOCK, CHEVES, NOTT, and JOHNSON, JJ., concurred.

In *Clancey v. Robertson*, reported in 2 Mill, 404, an action of assumpsit to recover overseer's wages, it appeared that the defendant had hired the plaintiff to act as overseer for him, agreeing to allow the plaintiff one fourth of the crop. When the crop had become well advanced, the defendant turned the plaintiff away, without any cause, and offered him one fourth the value of the crop as it then was. The court held that the plaintiff was entitled to one fourth the supposed value of the crop at the time when it should be gathered.

LIVINGSTON, EXECUTOR, v. LIVINGSTON, ORDINARY.

[2 MILL, 428.]

PARTIES TO ACTION.—The same person cannot be both plaintiff and defendant, although he is the representative of conflicting rights.

DEBT. The opinion states the case.

By Court, NORT, J. This was an action of debt on an administration bond. The plaintiff has obtained a verdict, and a motion is now made to set it aside, and to arrest the judgment on several grounds. The case is a tissue of irregularities from beginning to end, involving questions, some of which, if it were necessary to decide them, I should consider equally difficult and important. But as an insurmountable objection to any further progress of the cause presents itself at the threshold, which must forever put an end to it in this court, it is unnecessary to go into a particular statement of the circumstances, or to consider any other question arising out of the case. The plaintiff and defendant are the same person, and the question is, whether a person can in any instance maintain an action against himself? I believe a precedent for such a case cannot be found, and that, as well as the reason of the thing, I should think decisive of the question, if the books were silent on the subject.

But authorities are not wanting that such an action cannot be supported. The doctrine is well illustrated in the case of executors and administrators. It is laid down by Lord Coke, that if the obligor makes the obligee his executor, it is a release in law of the action: Co. Lit. 264 b. And in a note by Butler, a debt is only a writ to recover the amount of the debt by way of action, and as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing a creditor executor of his will, discharges the action, and consequently discharges the debt. In 1 Com. Dig. 336, it is also said that when an executor is indebted to the testator, his debt shall be released, for the executor cannot maintain an action against himself, and in a note of the editor, the same reason is given. In Tallor's Law of Executors, 230, it is laid down, that if a debtor appoint his creditor executor, he is allowed to retain his debt in preference to all other creditors of equal degree. This remedy arises from the mere operation of law, on the ground that it were absurd and incongruous, that he should sue himself, or that the same hand should at once pay and receive

the same debt. The same reason runs through all the books that treat on the subject. The whole current of authorities, from Lord Coke down to the present day, go to establish the same doctrine, and if we were disposed to carry our researches still further back, we should find that the same principle prevailed. The case, to be sure, under consideration is the case of an ordinary, and not of an executor, but the difference is only in name, and not in principle; whether the plaintiff is ordinary or executor, the principle is precisely the same, and must be in all cases where the character of plaintiff and defendant unite in the same person. The same incongruity exists in the one case as in the other, and the same consequences must follow. I think, then, it is satisfactorily established that the action cannot be maintained in this form, and what evil results from such a decision? The persons interested are not without a remedy. The court of equity is open to them, where they may have effectual, and in most cases, more ample relief, than can be obtained in this court. And the distinct jurisdictions of the two courts ought to be preserved. I am of opinion the judgment ought to be arrested.

CHEVES and JOHNSON, JJ., concurred.

COLCOCK and GANTT, JJ., dissented.

GRIMKE, J., was absent, being sick.

OBLIGOR AS OBLIGEE'S EXECUTOR.—The doctrine here referred to that it is a discharge of the debt due on a bond for the obligee to appoint the obligor his executor is discussed in *Griffith v. Chew*, 11 Am. Dec. 556, and in the note thereto.

McDOWELL v. GOODWYN.

[2 MLL, 441.]

STATUTE OF LIMITATIONS, COMMENCEMENT OF.—Where there is a promise to pay, either at an indefinite time, or on the happening of a contingency which is within the control of the promisor, the statute commences at once.

ASSUMPSIT. Plea, the statute of limitations, reply, an original sued out within four years, and a promise to pay. The evidence of a promise to take the case out of the statute was a letter dated February 8, 1809, in which the defendant acknowledged the present demand as a debt then due, and promised to pay as soon as he should sell his crops of 1807 and 1808, then

on hand. The original writ in this case was not sued out until March, 1814, more than four years after the date of the letter; but to support the replication of an original sued out within the statutory time, an original writ filed in February, 1812, in an action of assumpsit between the same parties, was produced wherein the present demand among others was declared upon, and judgment obtained except for the claim made the foundation of the present action. The cause was submitted upon the questions, when did the statute commence to run, and was the replication of original sued out, established. The presiding judge being of opinion with the defendant, nonsuited the plaintiff. Motion to set aside the nonsuit was then made.

By Court, JOHNSON, J. 1. Where a promise is made indefinitely without fixing any time for the payment, the statute of limitations begins to run instantly; and it appears equally clear that when a promise is to pay on the event of a contingency, the consummation of which depends wholly on the promisor, it also commences from the date of the promise, because he can defeat it at his will, or it might be defeated by accident; as in this case the defendant's testator might not have sold his crops for twenty years, or it might have been lost in transportation to market; and if he is to be bound by this promise, all the purpose of the statute would be wholly defeated; and if the doctrine contended for was to be established, I should not be astonished that we should directly see all contracts of this nature made to depend upon a contingency that could not possibly happen; and by this means the statute of limitations heretofore held so sacred would remain a dead letter in our statute book. In any event, however, it appears to me that even admitting the plaintiff's intestate might have considered this as a promise to pay in future, no presumption could have extended it to a year, a month, and twenty days beyond the date of the letter relied upon as the evidence of an undertaking to pay.

2. The rule is clear that to support the replication of an original, sued out within four years after the cause of action given or accrued, the plaintiff must show a continuance of that action up to the time of the trial to show that an action of the same, or a similar nature, was instituted between the parties, will not support it: Buller's N. P. 151; 1 Esp. Dig., part 1, 292, Gould's Ed. I am of opinion that the motion ought to be dismissed.

GRIMKE, COLCOCKE, NOTT, CHEVES, and GANTT, JJ., concurred.

"THE ACKNOWLEDGMENT OF A DEBT if accompanied with a promise to pay conditionally is of no avail, unless the condition to which the promise is subjected by the defendant is complied with, or the event has happened upon which the promise depends:" Angell on Limitations, sec. 235, 6th Ed. So also: *Sedgwick v. Gerding*, 55 Geo. 264; *Carroll v. Forsyth*, 69 Ill. 127, Scholfield, J., saying for the court: "The law as recognized by this court is, that to remove the bar of the statute of limitations it is incumbent on the plaintiff to prove an express promise to pay the money, or a conditional promise with a performance of the condition, or an unqualified admission that the debt is due and unpaid, nothing being said or done at the time rebutting the presumption of a promise to pay—it must be of such a character as clearly to show a recognition of the debt, and an intention to pay it: *Parsons v. Northern Ill. Coal etc. Co.*, 38 Ill. 433; *Ayers v. Richards*, 12 Id. 148; *Norton v. Colby*, 52 Id. 199."

SALLY v. SANDIFER.

[2 MILL., 445.]

THE DESTRUCTION OF A CONVEYANCE cannot divest the title of the grantee, though done for that purpose with his consent.

ACTION on two promissory notes given to the plaintiff's intestate by the defendant's intestate as the consideration for the conveyance of a certain tract of land. It appeared that the original parties to the deed agreed in their life-time to rescind the contract, and that the deed was delivered back to the plaintiff's intestate and was supposed to have been destroyed. After the death of the plaintiff's intestate the notes in question were found in his possession. The point raised in this action was, whether the redelivery of the deed would of itself amount to such a rescission of the contract as would vest the title in the plaintiff's intestate and thereby defeat the consideration of the notes. The presiding judge thought that it would not, but the jury found for the defendant. A motion for a new trial was then made.

By Court, JOHNSON, J. I think now, as I did on the trial below, that the land having vested in the defendant's intestate by the conveyance to him, it would not revest except by deed. And, I moreover think that I erred in not expressing this opinion to the jury in more decided terms than I did. I am, therefore, of opinion that a new trial ought to be granted. The land vested in the defendant's intestate by the conveyance from the plaintiff's intestate, and the only contract relied upon to revest it in the plaintiff's intestate was by parol, which is clearly void.

GRIMKE, COLCOCK, NOTT, CHEVES, and GANTT, JJ., concurred.

THE DESTRUCTION OR REDELIVERY OF A DEED by mutual consent or otherwise, will not operate to revest the estate in the grantor: *Hatch v. Hatch*, 9 Mass. 307; S. C. 6 Am. Dec. 67; *Cheesman v. Whittlemore*, 23 Pick. 231; *Kendall v. Kendall*, 12 Allen, 92; *Regan v. Howe*, 121 Mass. 424; *Gilbert v. Bulkley*, 5 Conn. 262; *Kearns v. Kilian*, 18 Cal. 491; *Lawton v. Gordon*, 34 Cal. 38, and 37 Id. 207; *Bowman v. Cudworth*, 31 Id. 149; *Riley v. Wilson*, 33 Id. 690; *Fawcett v. Kinney*, 33 Ala. 264; *Jackson v. Anderson*, 4 Wend. 474; *Raynor v. Wilson*, 6 Hill, 469, and note, 472; *Patterson v. Yeaton*, 47 Me. 308; *Connelly v. Doe*, 8 Blackf. 320; *Jordan v. Jordan*, 14 Geo. 145; *Lawrence v. Lawrence*, 24 Mo. 269; *Parker v. Kane*, 4 Wis. 1; *Wilke v. Wilke*, 28 Id. 298; *Grayson v. Richards*, 10 Leigh, 57; *Wilson v. Hill*, 13 N. J. 143; 3 Wash. on Real Prop., sec. 587. In New Hampshire a contrary doctrine prevails with respect to unrecorded deeds, by reason of a construction of the recording act of that state: *Dodge v. Dodge*, 33 N. H. 487.

MATHIS v. CLARK.

[2 MILL, 456.]

GARNISHEE, DEFENSES BY.—A person, when garnisheed, is entitled to every defense which he might urge against the defendant in the writ.

GARNISHMENT. A claim alleged to be due from Clark to one Lines, against whom a writ of attachment had issued at the suit of Mathis, was garnisheed. Upon the return, Clark urged that the sum of one hundred dollars garnisheed was the amount of unpaid purchase-money on a slave he had bought of Lines; that at the time of the return, the negro had run away, and that he did not answer to the description which had been given of him by Lines at the sale. Bay, J., presiding, ordered Clark to pay the one hundred dollars into court. An appeal was then taken to reverse this order.

By Court, GANTT, J. It is certainly competent for the plaintiff in this case to avail himself of all the rights and advantages which appertained to the absent debtor respecting what might have been owing from the garnishee, but no more. Suppose, instead of paying the one hundred dollars to Lines, the garnishee had retained it in his own possession till the court, at which the return was made by him, could there have been any pretense of condemnation of that sum for the use of the plaintiff in attachment under the special circumstances set forth in the return? I think not. If the circumstances stated to have been detailed in the return shall, on investigation, turn out to be correct, then the garnishee will be entitled to a reimbursement of the money paid to Lines on account of this purchase.

It is true, that if the garnishee had been *bona fide* indebted to the absent debtor, then any payment made to him after the attachment levied in his hands could not have been justified. But the event may show that he was not so indebted, and the garnishee, having come to the knowledge of the imposition practiced upon him before the return made respecting the negro purchased, and having made a special return thereof, I think the order requiring him to pay the one hundred dollars into the hands of the clerk, was illegal, and ought to be set aside; the plaintiff in attachment will have a right to contest the truth of the return made; and so far as he can make it appear, that at the time of the attachment the garnishee was indebted to the absent debtor Lines, so far will he be entitled to recover against him; but on such issue the garnishee will have the same right of defense against the attaching creditor Mathis, that he would have had if sued by Lines himself.

GRIMKE, NOTT, and CHEVES, JJ.. concurred.

See Freeman on Executions, secs. 416, 417.

AM. DEC. VOL. XII—44

CASES
IN THE
SUPREME COURT
OF
VERMONT.

NEWELL v. ADAMS.

[1 D. CHIPMAN,* 346.]

AFTER AN ASSIGNMENT OF A NON-NEGOTIABLE NOTE, for value, by the payee, and notice thereof to the maker, payment must be made to the assignee, and if the maker be summoned as trustee of the original payee, a disclosure of the assignment, and of notice given to him before service of process, will discharge him, and he need not show that the assignment was *bona fide*.

APPEAL from the county court. One Lampson having been summoned as trustee for the defendant in this cause, made a disclosure on oath to the effect that on March 15, 1813, he was indebted to the defendant on a certain note payable to the said defendant, or order, in grain, on January 1, 1814, and on a certain other note payable to the defendant, or order, September 10, 1813; that a few days before the trustee process was served on him he was notified by his son, who was his general agent for the transaction of business, that notice had been left with him, the son, by one J. W., that the said notes had been sold, indorsed and assigned by the defendant to him, the said J. W.; that the said notes so indorsed and assigned were now in the hands of the said J. W., who claimed payment of the same, and that he had paid a part thereof to the said J. W., since process was served. Upon this answer the county court decided that Lampson could not be held as trustee, from which decision the plaintiff appealed.

*Previous cases from 1 D. Chipman are reported in vols. I. and VI. of the American Decisions.

Langdon, for the plaintiff, contended that one of the notes not being payable in money, was not negotiable, and no action could be maintained thereon except in the defendant's name; but that if both notes were negotiable, the notice given to *Lampson* through his son was not sufficient; and further, that *Lampson* must show by his answer that the assignment was *bona fide*.

Williams, for the trustee.

THE COURT held that notes not negotiable at law are assignable in equity, and after such assignment and notice to the maker, the latter is bound to pay the assignee only, and that payment to the original payee after such notice will not protect the maker; that notice to the son, who was the general agent of the father, and who communicated such notice to him before any notice of the present suit, was sufficient to bind him in equity to make payment to J. W.; and that it was not necessary, when called upon as trustee, that he should swear that the sale of the notes to J. W. was *bona fide*. Had he been interrogated, he must, if he knew of any collusion, have disclosed it; but here was no such interrogatory, and certainly we are not to presume collusion, nor does it appear just that he should in this case be affected by any collusion between *Adams* and J. W. of which he had no knowledge. The decision of the county court was therefore affirmed.

ASSIGNMENT OF NON-NEGOTIABLE NOTE.—Referring to the doctrine here laid down that after notice to the maker of the assignment of a non-negotiable note the assignee's interest will be protected at law, *Kellogg, J.*, delivering the opinion in *Stiles v. Farrar*, 18 Vt. 444, says: "This principle is too well settled to admit of controversy. It is no longer an open question: *Newell v. Adams*, 1 D. Chip. 346; *Strong v. Strong*, 2 Aik. 373; 12 Johns. 344; 15 Id. 406; 16 Id. 51."

TUTTLE v. CATLIN.

[1 D. CHAPMAN, 366.]

PROMISE FOR BENEFIT OF THIRD PERSON.—Where a promise is made to one person to pay money for the benefit of a third, the latter can neither enforce it nor discharge it, unless it appears to have been the intention that he should receive the money when paid.

ASSUMPSIT on a certain receipt or contract signed by the defendant, the tenor of which is stated in the opinion. Plea, the

general issue. At the trial, the defendant offered in evidence a discharge executed by Levi Coit after he came of age, he being the person for whose benefit the contract was made, which evidence was rejected. Verdict for the plaintiff. The case was heard here upon exceptions to the opinion of the court in rejecting said evidence.

Van Ness, for the defendant, cited 1 Com. on Con. 564; 1 Com. Dig. 206.

Adams, for the plaintiff, cited 2 Day, 550.

By COURT. The words of the written contract on which this action is founded are: "Received of Thaddens Tuttle one hundred and fifty dollars to be paid in obligations against some good man or men, to be on interest for Levi Coit when he comes of age, on account of Thaddens Tuttle." Tuttle and Catlin are the only parties to this contract; it does not appear that Coit had any knowledge of it. The sum of one hundred and fifty dollars which Catlin received of Tuttle must be taken to have been Tuttle's money, in consideration of which Catlin promised to pay the amount in obligations to Tuttle, not to Coit. In every contract a promise to pay or deliver property without naming the person to whom the payment is to be made, is a promise to pay to the person with whom the contract is made, his name is understood and supplied in construing the contract. Catlin was by the terms of the contract holden to pay to Tuttle within a reasonable time; he had not the whole time until Coit should come of age, within which to make the payment. The obligations were to be on interest, evidently with a view that the sum might accumulate in Tuttle's hands until Coit should come of age, for whose benefit Tuttle then intended it.

It is admitted that this contract has not been fulfilled by Catlin; that he has not paid or delivered the obligations to Tuttle, but the defendant relies on a discharge of the contract from Coit. To decide that this discharge cannot avail him, it is unnecessary to go into a critical examination of the law relative to the maintenance of an action by a third person for whose benefit a promise is made. For even in the case of a contract made for the benefit of a third person, a relative, such third person cannot maintain an action on such contract, unless it appear that the person making the contract intended that he should receive and have the absolute control of the property

when paid; and this cannot appear unless the promise be to pay to such third person. And certainly it does not appear in this case that Tuttle ever intended that Coit should have the possession or control of this property when he should come of age, although he might have intended that he should have the benefit of it.

The discharge cannot be admitted in evidence.

Verdict for the plaintiff.

PROMISE FOR BENEFIT OF THIRD PERSON.—The right of one for whose benefit a promise is made, to maintain an action on it, is established in *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 304; see the note to that case for authorities bearing upon the subject; see, also, *Arnold v. Lyman*, 9 Id. 154, and note, where the doctrine is further discussed. The doctrine of the principal case is not necessarily at variance with these decisions. Here not only did the consideration move from the promisee, and not from the beneficiary, but there was no agreement, express or implied, to pay to the latter. His interest was merely collateral. "No case can be found in the books where the consideration moves from a person principally interested in a contract, and the contract is made with such person that one collaterally interested can sue in his own name. This would involve the absurdity that either of two distinct parties, at the same time, could sustain an action upon the same contract, and recover for the same identical thing." Redfield, J., in *Crampton v. Ballard*, 10 Vt. 251.

But the doctrine of *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 304, and of kindred cases, seems never to have been adopted in Vermont. The rule in that state is that the legal interest in a contract is in him to whom the promise is made and from whom the consideration moves, and he alone can enforce it at law. Thus in *Figure v. Mutual Soc. of St. Joseph*, 46 Vt. 392, a widow sued for certain benefits which the by-laws of a benevolent society to which her husband belonged, provided should be paid to the widows of deceased members. In delivering the opinion of the court in that case, Redfield, J., said: "It is insisted that the plaintiff cannot maintain this suit; that the contract having been made with the husband, and the consideration moving from him, the suit can only be maintained in his name or that of his legal representatives. Upon such declaration and proof as this case discloses, we think the decisions in this state have been uniform, that at law the plaintiff cannot recover. The consideration moved from the husband, and the promise was made to him, and hence he alone, or his legal representatives, can sue at law to enforce the promise: *Crampton v. Ballard*, 10 Vt. 251; *Pangborn v. Saxton*, 11 Id. 79; *Hall v. Huntoon*, 17 Id. 244; *Corey v. Powers*, 18 Id. 587. In some of the states a different doctrine has obtained, and cases are cited from New York that would support the right of action in the plaintiff; but the course of decisions in England seems in concurrence with the uniform rule in this state." See, to the same effect, *Phelps v. Conant*, 30 Vt. 277, and *Morcy v. Shellus*, 47 Id. 342. As to the right of a principal to sue on a promise made to his agent, see *Arlington v. Hinds*, *post*, and note.

MINER v. ROBINSON.

[1 D. CHIPMAN, 392.]

PAROL EVIDENCE AFFECTING INDORSEMENT.—In an action by the indorsee against the indorser of a non-negotiable note, indorsed in blank after maturity, parol evidence is admissible to show that at the time of the indorsement it was agreed between such indorser and indorsee, that the latter should sue the maker, and have recourse to the indorser only in the event of his inability to collect the amount from the maker.

WRIT of error to reverse a judgment of the county court in an action of assumpsit brought by Robinson, the defendant in error, against Miner, the plaintiff in error. The facts are stated in the opinion.

Heman Allen, for the plaintiff in error, cited *Rhodes v. Risley*, N. Chip. 86; *Barber v. Prentiss*, 6 Mass. 434; *Rex v. Landon*, 8 T. R. 384.

George Robinson, for the defendant in error, cited *Chitty on Bills*, 91-104; 1 Campb. 442.

By Court, SKINNER, C. J. The facts appearing upon the record in this case are, that a note was executed on the fourteenth of September, 1821, for sixty-eight dollars, by Thomas Lee, jun., made payable to James Miner in the month of June, 1822; that on the fifth of July, Miner indorsed his name upon the note and delivered it to James Atkins; the indorsement is left blank. Atkins delivered the note to Robinson, the nominal plaintiff, to collect as attorney. Robinson, in filling the indorsement for convenience in collecting, directed the payment to himself, and admits that the same rule is to govern the decision in the case as if the suit was in the name of Atkins. The indorsement is filled up by ordering the contents paid to George Robinson, value received. The note is not negotiable, and was indorsed after it fell due. Miner offered to prove on the trial, that at the time of the transfer, Atkins agreed to pursue Lee by action, and to have recourse to him (Miner) only in the event of the pursuit against Lee proving ineffectual. The county court rejected the testimony, and this is the cause assigned for error.

If the question was, what is the undertaking of the party, which the law implies upon a blank indorsement of a note not originally negotiable, and after the same falls due, or from an indorsement ordering the contents of such note paid to another, for value received, we are not prepared to say, that by this in-

dorsement the party indorsing is *prima facie* immediately liable on the neglect of payment by the maker, when thereto demanded by the holder, and notice of such neglect without any attempt on the part of the holder to enforce the collection of the money from the maker, or any evidence that such attempt would be unavailing; but we have no hesitation in saying that if such liability is implied, it may be rebutted. Atkyns having agreed at the time of the transfer to pursue Lee, the maker of the note, by suit before he had recourse to Miner, there can be no doubt, that, if the filling up of the indorsement contrary to this agreement, should in its effects prove prejudicial to Miner, an action would lie to recover the damages sustained. And it is difficult to discover on what principle Atkyns is entitled to recover contrary to his agreement. The claim is not that of a *bona fide* holder ignorant of the agreement, nor is the agreement attempted to be proved contrary to an express undertaking of the party in writing.

No opinion is intended to be intimated as to the rights and duties of the holder of a note not negotiable originally, and indorsed before the same falls due; whether he will be entitled to recover of the indorser without suit against the maker, or whether to secure a right ultimately against the indorser he is obliged to demand payment of the maker when the note falls due, and give immediate notice of non-payment, and that he shall look to the indorser. These are questions of sufficient importance to forbid a gratuitous decision. The question now before the court was agitated at an early day, and decided in the case of *Rhodes v. Risley*, 1 D. Chip. 52. Chief Justice Chipman, in that case, says: "The indorsement, though filled up by the indorsee, may be *prima facie* evidence of an obligation on the indorser, but it is only *prima facie* evidence, and in justice should be allowed to be contradicted." This decision of the supreme court has ever been regarded by subsequent courts as having settled the law in this state. The same principle is recognized in England. As between the immediate parties parol evidence is admissible to control or impeach the promise or undertaking. Although the indorsement of a note is said to be equivalent to drawing a bill of exchange, and the effect is to charge the indorser as the drawer of a bill, and, although the principle may have been extended to notes not originally negotiable, yet, when the rights of third persons are not affected, and the party is not a holder having paid a value, ignorant of the circumstances attending the transfer, courts have suffered

not only an injury into the consideration, but other circumstances to defeat a recovery: Bull. N. P. 274; 1 Esp. 117, 263; Salk. 128; Str. 674; Chitty, 85 and on; 8 T. R. 379; 6 Mass. 434; 11 Id. 32 [*Stackpole v. Arnold*, 6 Am. Dec. 150]. We are therefore of opinion that in the judgment of the county court there is error, and the same is reversed.

PAROL EVIDENCE AFFECTING INDORSEMENT.—The decisions are conflicting upon the point as to whether parol evidence is admissible, as between an indorser in blank and his immediate indorsee, to vary the effect of the indorsement. The cases bearing on this subject are examined in the note to *Hill v. Ely*, 9 Am. Dec. 376; see, also, *Daniel v. McRae*, 11 Am. Dec. 787, and note.

BARNEY v. BLISS.

[1 D. CHIPPEAN, 309.]

A TENDER OF SPECIFIC ARTICLES at the time and place appointed by the contract, discharges the contract, and vests the property in the creditor, whether he attends to receive it or not.

A PLEA OF TENDER of specific articles must state an actual tender; and a plea stating that the debtor had the property ready at the time and place to deliver to the creditor, and there remained throughout the day, but that the creditor did not attend to receive it, and that it is still ready for the creditor if he will receive it, is insufficient.

ASSUMPSIT on a note made by the defendants, promising to deliver to the plaintiff ten thousand good, merchantable pine boards, on October 1, 1819, at the defendants' saw-mill. Plea in bar, that at the time and place appointed the defendants had the said boards sawed and prepared for payment of the said note, and were ready then and there to have paid the same, and remained at said mill throughout the said day and until sundown, for the purpose of delivering the said boards to the plaintiff, but that he did not come to receive them, and that said boards ever since have been, and still are ready for the plaintiff at the said mill, if he will take them. Demurrer to the plea.

Griswold and Fullet, for the plaintiff, cited *McConnel v. Hall*, Brat. 224; *Wood v. Beeman*, Id. 227; *Swift's Dig.* 290, 294.

Adams, for the defendants, cited 1 *Swift's System*, 405; *Robbins v. Luce*, 4 Mass. 474; *Rowe v. Young*, 2 Brod & B. 165.

By Court, SKINNER, C. J. The plaintiff in this case declares upon a note of hand, in which the defendants promise to pay

him ten thousand feet of good, merchantable pine boards, on the first of October, 1819, at the saw-mill hired by the defendants of the plaintiff. The defendants plead in bar a readiness to perform at the time and place, to which plea there is a demurrer.

The first inquiry is as to the nature and effect of the defendant's plea. The principle is well settled, and questioned by no one, that if the party, on whom rests the obligation to pay a debt or perform a duty, is prevented from fulfilling his contract by the act or neglect of the other party, a tender will excuse him from any liability in damages for non-performance. If the same consequences will follow from the fact of a readiness to pay or perform, as from the fact of actual tender, it may be true that a plea of readiness, etc., may in such case be interposed instead of a plea of tender; but if the case is one, in which the consequences of a tender are materially different from those of a readiness to perform, and in which a tender can be made, a plea of readiness will not avail the party. There is no case in which a plea of this kind has been attempted, where a tender could be made; it is rather an excuse for not tendering. The party is bound to do all he can to perform his contract; and in this case it is readily perceived, that if a tender could be made without the presence of the other party, and that tender would have the effect to discharge the liability of the defendants upon their contract, a readiness to perform, unless it has the same effect, cannot be pleaded. If the effect of a tender is not only to discharge the debt or duty, but to change the ownership of the property tendered, the objection to a plea of readiness, etc., is too obvious to require illustration. It is not material to inquire why the practice has prevailed of pleading a tender specially in cases where the defendant is discharged thereby, and the effect is the same as an actual payment of the debt or performance of the duty. The reasons assigned for pleading a tender will hardly apply in such a case, especially in actions of assumpsit. It is insisted by the defendant's counsel, that every consequence that would have resulted from an actual tender, will result from a readiness, where the creditor is absent. This is undoubtedly settled law, where the attendance of the creditor is necessary to enable the debtor to perform his contract. It is also true that a formal offer to perform in the absence of the creditor has been usually adopted, and is called in the books a tender in law, and is so pleaded.

In this case no sufficient reason is, or can be assigned, why

the presence of the payee could not be dispensed with. There was no precedent act to be performed by him; no appointment of appraisers, as in the case of *Brooks v. Page*; no election to be made or manifested by him. The consideration on his part is executed and past. Ten thousand feet of boards were to be delivered at the plaintiff's saw-mill, then occupied by the defendants. It would be going farther than any authority will warrant, to say that it was necessary in this case for the plaintiff to aver and prove, that he was ready at the time and place, or fail of recovery; that he must be ready, at his peril, at the time appointed. On the other hand, there is no authority to be found to support the position, that the defendants, by the default of the creditor, shall be deprived of the privilege of setting apart the specific articles, and thereby incur at most the obligation of bailees, and not be subjected at all events, in case of loss or destruction. But if, as we believe, the debt or duty is discharged by a tender, the doctrine, that the creditor cannot, by his fault, in absenting himself, prevent the debtor from effecting his discharge, follows from the plainest principles of law and common sense. It equally follows, that the latter is liable, if he neglects to do all in his power to perform. The important question then is, does the tender of specific articles discharge the debt or duty?

The able and ingenious essay of a distinguished jurist of the state on this subject, as well as the labored arguments of the counsel in the case, although opposed to the generally received opinion, have received all that attention and consideration, which the time and ability of the court would permit. And was it not, that we consider the common law as settled in the case, both in England and in this country, and which we are not at liberty to disturb, we are not prepared to say, that a better rule might not perhaps be adopted.

The principle that a tender of specific articles, according to the contract, shall discharge the debt or duty; and that the party tendering is not obliged to keep the thing tendered (as he is in the case of money), and of course is not obliged to plead that he is still ready, is very clearly recognized and held in *Peytoe's case*, 9 Rep. 78, and also in Co. Lit. 207. And the reasons on which it is founded seem to have been so conclusive and satisfactory, that no attempt has since been made to oppose it; nor have the inconveniences resulting from it, been such as to induce the introduction of a law of consignment or deposit, as in France. That a different rule ought to be applied

in this case, from that of a tender of money will appear from the reasons assigned, and which mark the distinction. Even in the case of money, to compel the debtor to keep it, and hold him liable for the debt, which he is able and willing, and has done all in his power to discharge, according to his undertaking, but is prevented by the neglect of the creditor, is opposed to common justice, and the ordinary rules of law. Where the contract is for the delivery of specific articles, the reasons assigned for not requiring the party to go beyond his contract, and incur a further obligation, attempted to be cast upon him by the creditor, are, that goods are perishable, and that there is an expense attending the keeping; he is, therefore, not required to apply the care and diligence, and incur the expense necessary for their preservation and support, and which, in many cases, must be very considerable. The case in 9 Co. is supported by a case decided in 28 Hen. VIII., as reported by Cappel. In the 20 Viner. 306, a case is stated thus: "If the obligation be of sixty pounds to enfeoff the plaintiff by such a day, or deliver him a horse, or such like, which is not money, tender by the defendant and refusal by the plaintiff, is sufficient for the defendant forever." In the same book, 310, in another case, the same principle is found. We are not apprised of any decision in this state opposed to this doctrine; but in the case of *McCormell v. Hall*, the supreme court very decidedly approves the principle. The court there say: "The promisor, after a fulfillment of his contract, is not bound to keep the property always ready, as in case of tender of money; he must, therefore, make such designation of the article, on the day, and at the place of payment, as will transfer the property to the promisee, and enable him to pursue the property itself."

In Connecticut and New York the question is considered at rest by repeated decisions. Judge Swift says: "It may be laid down as a general rule, that when contracts are made for the delivery of goods, or any article other than money, a tender of the thing contracted for, according to the contract, though refused to be accepted by the promisee, absolutely discharges the contract." In 8 John. R. 478, the court say, as to the effect of the tender, "we consider it a complete bar to the suit upon the contract." And from the reports of cases in New Hampshire and North Carolina, it appears the same doctrine has been approved in those states.

Judgment, plea in bar is insufficient.

TENDER OF SPECIFIC ARTICLES, WHAT IS.—Tender, as the etymology of the word implies, is an actual offer of the goods or articles specified in a contract for their delivery. "The word tender imports not merely readiness and ability to pay the money or to deliver the deed or the property in question, but also the actual production and offer of the thing: *Holmes v. Holmes*, 12 Barb. 137;" *Abbott's Law Dict.*, "Tender." In other words, the act of tender must be such that it needs only acceptance by the vendee to complete the transaction. The promisor must do all that would be necessary on his part to constitute a full delivery of the articles. Thus where a contract was in part for the delivery of certain cash notes, it was held that the promisor must not merely have the notes present, but that they must be properly indorsed and actually offered: *Healy v. Streeter*, 5 Ind. 207. So, where the contract was for the delivery of boards, which the law required should be surveyed when sold, it was held that the promisor must have them surveyed to constitute a tender: *Jones v. Knowles*, 30 Me. 402. If the goods are under a lien the lien must be discharged: *Dunham v. Pettee*, 4 E. D. Smith, 500. And in a contract for the delivery of a large quantity of grain in a warehouse, it was held that a readiness to tender warehouse receipts for the same was not sufficient, but there must be an actual tender or offer of them: *McPherson v. Gale*, 40 Ill. 368. But in *Robbins v. Luce*, 4 Mass. 474, it was held that where the vendee did not attend, readiness to deliver would be sufficient.

SEPARATION NECESSARY.—The articles must be separated and set apart from others of a like kind: 2 *Parsons on Con.* 646; *Devees v. Lockhart*, 1 Tex. 535; *Veazy v. Harmony*, 7 Greenl. 91; *Wyman v. Winslow*, 11 Me. 396; *Leballister v. Nash*, 24 Id. 316; *Bates v. Churchill*, 32 Id. 31; *Giltman v. Moore*, 14 Vt. 45; *Bates v. Bates. ante*, 572. But it has been held in some cases that where the contract is for the delivery of a given quantity of an article sold in bulk, as corn and the like, there need not be separation and identification, for there, as in the case of a tender of money, it cannot matter to the party to whom the tender is made, what particular articles he receives since they are all equally valuable. One bushel of corn from a common mass is like all the rest, just as one coin is like every other of the same denomination. It was held, on this principle, in *Armstrong v. Tail*, 8 Ala. 635, that under a contract for the delivery of a specified quantity of "corn-shucks," it was not necessary to a valid tender, that the shucks should all be stripped from the corn and separated from the common mass. So where the contract was for the delivery of a given quantity of corn: *Hughes v. Prewitt*, 5 Tex. 264. So under a contract for the sale of a reaping machine of a particular pattern, out of a number of such machines: *Ganson v. Madigan*, 9 Wis. 146. It is obvious, however, that a tender of this kind cannot have the effect to pass the title to the vendee as to any particular part of the common bulk or to any particular article, and that where a tender without separation and identification is held good, the case must be further assimilated to a money tender by requiring it to be pleaded with an averment of *uncore prius*. The tender must be kept good, although, of course, it is not necessary in the case of bulky articles, that the promisor should have them ready in court. In accordance with this idea it is laid down in *Chipman's Essay on Contracts*, 96, that "every plea of tender must contain an averment that the property is still ready." But this can only be necessary where the tender does not pass the title to the property, and the law is so laid down in *Co. Lit.* 207.

EFFECT OF THE TENDER.—"It is now settled," says *Redfield, J.*, in *Dewey v. Washburn*, 12 Vt. 580, "that the defendant may discharge his contract by

a tender at the time and place of payment, and that he is bound to do so whether the payee attends or not: *Barney v. Bliss*, 1 D. Chip. 399." See, also, *Mattison v. Westcott*, 13 Vt. 258. But in *Downer v. Sinclair*, 15 Vt. 495, it was held that this discharge of the debt by an unaccepted tender was not technically a payment. But if it satisfies the contract and transfers the title to the property it is not easy to discover wherein it differs from a payment. A complete and valid tender discharges the debt and passes the title in the property to the creditor, even though he is absent: 2 Parsons on Con. 653, 654. This seems to be the established rule in New York: *Coit v. Houston*, 3 Johns. Ca. 243; *Slingerland v. Morse*, 8 Johns. 474; *Lamb v. Lathrop*, 13 Wend. 95; *Bement v. Smith*, 15 Id. 493; *Des Arts v. Leggett*, 16 N. Y. 582. In the case last cited, however, SELDEN, ROOSEVELT, and PRATT, JJ., concurred in the opinion that in case of a refusal to receive the articles the party making the tender might, at his election, acquiesce in such refusal, and retain the property as his own and remain liable on the original contract. That the tender, properly made, satisfies the debt and passes the title is held also in an early Kentucky case: *Mitchell v. Gregory*, 4 Am. Dec. 655. So, in Alabama, *Garrard v. Zachariah*, 1 Stew. 272; and in Texas, *Bradshaw v. Davis*, 12 Tex. 336. Satisfaction of the debt and transfer of the title go together: 2 Parsons on Con. 654. It was held, however, in *Weld v. Hadley*, 1 N. H. 295, that though the debt might be discharged by the tender, the title would not pass unless such tender were accepted, but there seems to be neither reason nor authority to support this doctrine: 2 Parsons on Con. 654, note *w*.

VENDOR AFTER TENDER BECOMES BAILEE.—But where the tender is made and not accepted, the vendor need not, and indeed must not, abandon the property. He retains possession of it as the bailee of the vendee, who is the owner, and at whose risk it is: 2 Kent's Com. 508; *Coit v. Houston*, 3 Johns. Cas. 243; *Garrard v. Zachariah*, 1 Stew. 272. The tender of the goods "only exonerates the party from responsibility for their safe keeping. But as long as he continues in the possession of the goods he will be bound to deliver them on demand." Thompson, J., in *Coit v. Houston*, 3 Johns. Cas. 243.

CASES HOLDING TITLE NOT TRANSFERRED.—There are several cases holding that an unaccepted tender does not pass the title, and that in order that it should operate a discharge of the debt, the defendant must plead the tender with an *uncore prius*. That is to say he must aver and prove a continued readiness to deliver the property: *McJilton v. Smizer*, 18 Mo. 111; *Fleming v. Potter*, 8 Watts, 380. And this seems to be the doctrine of Chipman's Essay on Contracts.

AS TO THE TIME AND PLACE of making the tender, see *Bates v. Bates*, ante, 572, and note.

HIGLEY v. SMITH.

[1 D. CHIPMAN, 409.]

ADMINISTRATOR'S DEED.—Where an administrator sells real estate under an order of the probate court, and takes a mortgage of the same or other land to himself as administrator, to secure the purchase-money, a foreclosure of such mortgage vests the estate in him personally, but a subsequent conveyance of the same by him as administrator will pass his title, and the covenants contained in such conveyance will bind him personally.

Action for money had and received, money paid, etc. Upon the plea of the general issue, the plaintiff offered evidence to make out the following case: In September, 1814, the defendants, as administrators of Silas Smith, deceased, conveyed to the plaintiff a certain farm, pursuant to an order of sale of the probate court. The plaintiff, upon the receipt of the deed, paid part of the purchase-price, sufficient to discharge the debts of the estate, and to secure the payment of the balance, executed a mortgage of the premises to the defendants. This mortgage defendants subsequently foreclosed, and took possession of the land. In May, 1818, the plaintiff again purchased the land of the defendants, who without an order of the probate court therefor, executed as administrators a quitclaim deed to the plaintiff. Five hundred dollars was paid as part of the consideration of the deed, and a mortgage of the premises executed to secure the payment of the residue. This mortgage was foreclosed, and pursuant to an order of the probate court, the land was set off to the heirs of Silas Smith.

The evidence offered was rejected, and a verdict was found for the defendants. The cause now came on to be heard upon a motion for a new trial.

Phelps and Holley, for the plaintiff, sought to recover the money paid on the quitclaim deed upon the ground that no title had been conveyed to him, and cited: *Sugden on Vendors*, 313; *Peake*, 94; 3 *Bos. & P.* 162; 7 *Mass.* 14, 30; 1 *Day*, 167; 2 *Id.* 252, 437; 11 *John.* 50; 6 *T. R.* 606.

Bates and Everest, contra.

By Court, WILLIAMS, J. The plaintiff claims a right to recover in this case, on the ground of a want of consideration for the sum paid to the defendants on the last purchase. He contends that the deed executed in May, 1818, was wholly inoperative as to conveying any title. And that the title attempted to be conveyed still remains in the defendants as before the quitclaim deed was executed. That if the title was, at the time this deed was executed, vested in the defendants, in their personal or private capacity, the deed was inoperative, inasmuch as it purports to convey their title as administrators. And, if the title was in them, in their representative capacity, the deed was void for want of authority to make it, the administrators having before sold real estate in pursuance of the order of the court of probate, sufficient for the purpose for which the sale was authorized; and that purpose having been once answered,

the power ceased. If these premises were correct it would not follow that the plaintiff is entitled to recover in this action. The deed which was executed by the defendants purported to convey to the plaintiff in this action a certain tract of land, and the plaintiff might have protected his purchase by such covenants as he deemed necessary for securing his title. If they attempted to convey as administrators, they could have been required to covenant that they were duly authorized.

This does not compare with that class of cases where the purchaser, who has paid the purchase-money and has been ousted before the conveyance is executed, has been permitted to recover back the money paid in this form of action. Nor does it appear from the facts offered to be given in evidence that the plaintiff was evicted from the land in consequence of any defect in the title conveyed to him by the defendants, but on the contrary the recovery was had by these defendants by virtue of the mortgage deed executed by the plaintiff, on the forfeiture of the lands therein granted, by reason of the non-performance by the plaintiff of the condition therein contained. And we cannot say that this case is similar to any of those which have been cited where this form of action has been maintained. It is unnecessary, however, to examine those cases particularly, as the case is, on another ground, clearly with the defendants.

The defendants, as administrators, had no interest in the land of their intestate. By virtue of their appointment as administrators, they had only an authority to sell for the purposes which the law designates when thereto authorized by the court of probate. When thus authorized they can pass to a purchaser whatever title their intestate had, and take such security for the purchase-money as may be satisfactory to themselves, either by a mortgage of the same land, or of any other land, or in any other way, but they are at all events accountable for the sum for which they sell. If they take security by mortgage, on the foreclosure of the mortgage, whatever title was conveyed by the mortgage deed becomes absolute in them in their individual capacity. It follows from this that the defendants, by their deed executed in September, 1814, complied with the order of the court of probate, and had no further authority to sell the real estate of their intestate by virtue of that order. And on the foreclosure of the mortgage executed by Higley at that time, whatever title he derived to the land by the administrator's deed to him became vested and absolute in them in their individual capacity, and no order from the court of pro-

bate was required to entitle them to convey the land the title of which was thus vested in them. The only inquiry, then, is, whether by the deed of May, 1818, this title was conveyed to the plaintiff. The deed purports to convey all their, the defendants, title. The grantors do not say that they convey in pursuance of any authority from the court of probate, or that they convey the title of their intestate, but all their right. It is true they describe themselves as administrators, and in that capacity quitclaim to the plaintiff, and covenant in that capacity to warrant and defend the land granted. Describing themselves as administrators, is merely descriptive of the character in which they had acted, or the manner in which the estate came to them. And the covenant of warranty, notwithstanding they use the expression, "in our capacity as administrators," binds them personally: *Sumner v. Williams*, 8 Mass. 162 [5 Am. Dec. 83]; *Burrell v. Jones*, 3 Barn. & Ald. 47; *Childs v. Mowins*, 2 Brod. & Bing. 460.

The defendants, as administrators, could have no title to pass; they had no authority at that time to convey any real estate of their intestate, and they could make no covenant which could affect the estate which they represented. On the whole, the court are of opinion that the deed executed by the defendants, in May, 1818, passed the title of the defendants to the land in question to the plaintiff, and the covenant of warranty contained in the deed created a personal obligation on the defendants.

The plaintiff takes nothing by his motion, and judgment must be entered on the verdict.

LIABILITY OF ADMINISTRATORS ON COVENANTS IN DEED.—On this subject see *Sumner v. Williams*, 5 Am. Dec. 83, and note; and *Booth v. Starr*, Id. 149, and note.

ARLINGTON v. HINDS.

[1 D. CHIPMAN, 431.]

A NOTE MADE TO A TOWN TREASURER by name, "or his successors in office," may be sued by the town.

PAROL EVIDENCE TO SHOW THE TOWN of which the nominal payee in such note was treasurer is admissible, if the note does not show that fact.

STATUTE OF LIMITATIONS AFFECTING ATTESTED NOTE.—Where the statute of limitations prescribes a longer period for a note attested by one or more witnesses than for notes not so attested, and a note made to a town

is attested by a resident of the town, such note will be regarded as an attested note, unless it clearly appears that the witness was a rated inhabitant, or was otherwise disqualified by reason of interest.

Assumpsit on a note of the following tenor: "Arlington, September 27, 1808. For value received, I promise to pay Luther Stone, town treasurer, or his successors in office, eighty-four dollars and twenty-seven cents." Plea, the general issue. The cause was tried by the court by consent of parties. The evidence was that the defendant, at the time of signing the note, was a resident of the town of Arlington, and that Luther Stone was the treasurer of said town from 1789 continuously for thirty-two years; that the note was in the usual form of notes given for moneys due the town; that the note was made for certain rent of school land due the town from one Austin, who attested the note as a witness; and that the said Austin was, and had been for two years before the making of the note, a resident of Arlington.

Smith, for the plaintiff, contended that the note having been made and dated at Arlington must be intended to have been made to the town treasurer of that town, particularly as it appeared from the evidence that the parties were all residents of that town, and that the note was given for a debt due the town, and that therefore the town and not the treasurer, who was its agent as appeared from the note, was the proper plaintiff, and cited the following authorities upon the several points made by him: 1 Chit. Pl. 5, 24; *Piggot v. Thompson*, 3 Bos. & P. 147; 13 Johns. 38; *Rathbone v. Budlong*, 15 Id. 1; *Randall v. Van Vechten*, 19 Id. 60 [10 Am. Dec. 198]; 10 Mass. 360; *Gilmore v. Pope*, 5 Id. 491; *Mann v. Chandler*, 9 Id. 335; *Hovey v. McGill*, 2 Conn. 680; *Hodgson v. Dexter*, 1 Cranch, 345; *Hinds v. Stone*, Brayt. 330; 2 Bl. Com. 379; *Powell on Con.* 138, 139, 376, 385; Chit. Ev. 417; 3 Co. 79 B (n. 44); 1 Cranch, 345; 3 Mass. 77; 1 Bac. Abr. 501, 502, 503; *Croyden Hospital v. Farley*, 1 Com. Law. Rep. 455; *Minott v. Curtis*, 7 Mass. 441; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252 [7 Am. Dec. 271]; 3 East, 274; 4 Day, 159, 349; *Bank of Columbia v. Patterson*, 7 Cranch, 259; *Danforth v. Schoharie etc. Co.*, 12 Johns. 227; *Dun v. St. Andrew's Church*, 14 Id. 118; 1 Chit. 299, 302; 1 Sel. N. P. 117; *Martin v. Hind*, Cowp. 434. 1 Chit. on Bills, 530, note 1; 532, note 10.

Bennet, for the defendant, contended: 1. That the town could not recover on the note, because it did not appear on the

face of the note that the consideration from the town and parol evidence was inadmissible to prove it, the fact of the execution of the note at Arlington being immaterial, the date being no part of the contract, and because even if the consideration moved from the town, the note being made payable to the treasurer, he alone could sue on it, the addition of town treasurer being merely *descriptio personæ*, citing 11 Mass. 27 [*Stackpole v. Arnold*, 6 Am. Dec. 150]; Id. 54; 2 Cranch, 302, 308; Law's Pl. 248; Ham. P. A. 11, 33, 313, 314, 316; 10 Mod. 286; 6 East, 110; 8 Mass. 103; 9 Johns. 335 [*Taft v. Brewster*, 6 Am. Dec. 280]; 1 Wash. 199; Carth. 5; 2 Str. 555; 4 Mass. 263; 2. That the note was barred by the statute of limitations, being in fact an unattested note, since Austin, the attesting witness, was disqualified by interest, because, first, he was a resident of the town, and second, the note was given for his debt, citing 7 T. R. 64; 5 Johns. 68 [*Tobey v. Barber*, 4 Am. Dec. 326]; 2 Day, 399.

By Court, SKINNER, C. J. The plaintiff's right to recover is resisted on the ground that the town is not a party to the contract and cannot maintain the action, and also, that the statute of limitations constitutes a bar.

We learn from the records of this court that an action has been heretofore brought upon the note here given in evidence by Luther Stone, as treasurer of the town of Arlington, in which judgment was rendered for the defendant, upon the principle that no right of action thereon accrued to him in his official character. It also appears by the records that after that decision, Luther Stone, in his private capacity, instituted a suit upon the same note in which he failed on the ground that from the face of the note it appeared that he was not the party in interest. The counsel for the defendant now contends that the last decision, which was in his favor, was incorrect, and not warranted by authority. If it were proper to question this decision in a case where the same point was presented, it cannot be necessary here, for it does not follow of course, that, because an action may be sustained by one, all others are precluded. There are many cases of principal and agent, bailor and bailee, etc., in which the right is in either.

The question is, can the action be sustained by the present plaintiff? Whether he, for whose benefit a contract is made by another, is entitled to recover on it or not, is a question which has long been agitated in the courts. In some of the cases,

where it has been held the action cannot be maintained, the reason assigned is that the promise is made to another, but, in most of the cases, it is because he is a stranger to the consideration. On examining the cases it will be found to have been decided that where the promise is made to him from whom the consideration moves, for the benefit of another, the action cannot be sustained by the latter. There are also authorities of great weight that maintain the right of the latter to sue upon such contract. Many of the authorities show that an action can be maintained by the former, and some, that the action may be sustained by either. There are cases in which it has been decided the former cannot sue. Cases also are to be found, in which the promise is made direct to the latter, and still he is not permitted to bring the action. The fair conclusion from all the cases is not, that the right to maintain the action by him from whom the consideration moved, is not supported by the current of authority; but the right to maintain the action by him for whose benefit the contract is made, the consideration moving from another, may be considered doubtful, especially where the promise is not made direct to him. The principle seems to be, that as a consideration is necessary to the validity of all simple contracts, it becomes material in deciding to whom the right of action belongs, to inquire from whom the consideration proceeded: Str. 592; 11 Mod. 241; Cro. Eliz. 380; Hard. 321; Keb. 44, 64; 122; Cowp. 437. As we view this case, the question whether the action shall be sustained by the person only from whom the consideration moves, or by the person for whose benefit the promise is made, is of no importance, for, whichever way that question be decided, it will be equally favorable to the plaintiff's right to recover, the consideration having proceeded from, and the promise made for the benefit of, the plaintiff.

It is said that the consideration here is out of sight, and that it cannot be inquired into. This position is hardly warranted by authority. We have no law subjecting notes to the rules of the law merchant. By statute, in England, and in some of the United States, promissory notes are placed upon the footing of bills of exchange, which import a consideration. They are here considered as they were in England before the statute of Anne, simple contracts, and are subject to all the rules of the common law applicable to such contracts; their consideration may be inquired into, though the burden of proof is on the defendant; that is, he must show the want of consideration if

the note express value received. To inquire from whom the consideration moved is not strictly to impeach it. In this court, when an action was pending upon this very note, brought by Luther Stone, it was decided that he was a stranger to the consideration, evidenced from the face of the note, and that he was not entitled to recover.

This has been very properly considered by the counsel for the plaintiff, as the case of a contract with an agent. To oppose this it is said that the contract is a perfect one on the face of it, and cannot be enlarged or diminished; that it does not appear from the note that the consideration moved from the town of Arlington; that the legal interest of specialities, bills of exchange, and promissory notes, is in the person appearing on the face of them.

The principle contended for as to deeds and mercantile instruments is just. That this note is not of that description has already been attempted to be shown. If the position were correct that no written contract which upon the face of it is perfect, and in which nothing is expressed from which it may be inferred that any other than those whose names appear therein are interested; in other words, the name of the principal is concealed, can be enlarged, etc., it cannot be applied here; for no one can entertain a doubt, on reading this instrument, that Luther Stone has no interest in the contract; that he acted as agent for the town, and that the interest was in the town. The promise is to pay "Luther Stone, town treasurer, or his successors in office." It would be unnatural and strange indeed that Luther Stone, from his private effects, should be making provision, in case of his death or removal from office, for his successor. The case, then, is one in which the principal is not concealed, or rather the agency is manifested; and in such case the principle insisted on by the plaintiff's counsel, that the agent cannot sue, is fairly drawn from the cases cited of *Pigott v. Thompson*, 8 Bos. & P. 147; *Bowen v. Morris*, 2 Taun. 374, and several others. Where a contract is made with an agent, and the principal named, no one ever doubted the right of the latter to maintain the action.

But it is said that although it does appear that Luther Stone was not personally interested, but was acting as agent, yet it does not appear from the note who was his principal; that is, of what particular town he was treasurer; and that this cannot be supplied by parol testimony. Assuming, then, that Luther Stone was agent, that the interest in the contract is the

interest of his principal, and for which he might sue if named, the correct reading of the note is this: "I, Adin Hinds, in the town of Arlington, this twenty-seventh day of April, 1808, promise, for value received, to pay the town eighty-four dollars and twenty-seven cents." The fair and legal inference must be that the town named in the instrument as the place where the contract is made, is the town to whom the promise is made. But if this is uncertain, the ambiguity we consider may be explained by testimony *aliunde*.

The defendant further relies upon the statute of limitations. The statute provides that actions upon promissory notes attested by one or more witnesses, shall be commenced within fourteen years, etc., on notes unattested within six years. It is true this note was executed before the passing of the act authorizing citizens of towns to testify in cases in which the town may be interested, and is attested by J. Austin, who then resided in Arlington. But, as there is no proof that he was a rated inhabitant, or had any interest, unless it arose from bare residence, the question as to the effect of an attestation of an interested witness does not require examination.

Judgment must therefore be for the plaintiff.

SUIT BY PRINCIPAL ON NOTE TO AGENT.—The doctrine here laid down that where a note is made to one as agent upon a consideration advanced by the principal, the principal has a right of action thereon, has been repeatedly followed in Vermont. In *Warden v. Burnham*, 8 Vt. 390, where a retiring partner made an order directed to one of the remaining members of the firm to deduct a certain sum from an account due the firm from one Mrs. Doe, and to charge the same to such retiring partner, and the deduction was made accordingly, it was held that the right of action on the promise was in the firm and not in the partner to whom it was made, Collamer, J., said: "The law is well settled that, as relates to simple contracts, the promise, to whomsoever made, inures to, and is deemed a promise to, whoever has the beneficial interest, which is the person from whom the consideration moves. The authorities on this subject are collected in Hammond and recognized at full length in the case of *Arlington v. Hinds*, D. Chip. 431. Here the discount was made on Mrs. Doe's account, which account belonged to the three Wardens. From them the consideration moved, and therefore to them the defendant's contract inured, and it was in legal effect a promise to them and not to the plaintiff." So, where a note was indorsed to one as "cashier" it was held that the right of action was in the bank of which he was cashier: *Farmers' and Mechanics' Bank v. Day*, 13 Vt. 36; *Bank of Manchester v. Slason*, Id. 334. So where a note was made to certain persons as "commissioners of the Vermont Central railroad company" and was afterwards delivered to the company, on its organization it was held, partly on the authority of the principal case that the company could sue on the note: *Vermont Cent. R. R. Co. v. Clayer*, 21 Vt. 30.

DOCTRINE DOUBTED IN SUBSEQUENT CASES.—The courts of Vermont have shown a disposition, in several of the later cases, to question the soundness of the reasoning upon which the decision here made is based while admitting the law to be practically settled in accordance with that decision. Thus in *Rutland etc. R. R. Co. v. Cole*, 24 Vt. 33, where the note sued was made payable to "the order of Samuel Henshaw, treasurer," etc., it was held on the authority of the principal case that the action was well brought in the name of the company, but the court, while admitting the law of the case to be settled, expressed their doubts of the validity of the principles upon which it was founded. They said in their opinion: "The very able argument addressed to us on behalf of the defendant would abundantly satisfy us, if we had entertained doubts that by the general commercial law of most countries, where the common law of England prevails, a promissory note, like the present, must be sued in the name of Henshaw. That is the result of the very learned opinion of Justice Prentiss in the circuit court of the United States in the *Bank of U. S. v. Lyman*, 20 Vt. 666. But in this state, since the case of *Arlington v. Hinds*, 1 D. Chip., a different rule has prevailed, and has been constantly practiced upon and repeatedly recognized, by the courts of the state, to such an extent as to be regarded as the settled law of the state. This being the case, we should not feel justified in changing the same by a mere arbitrary determination of this court, unless some important end of justice was thereby to be subserved. And we cannot perceive how it can be of much importance whether a promissory note before indorsement follows the rule of other simple contracts, as to the right of action, or is restrained to that which obtains in the case of specialties. For all practical purposes a promissory note before it is negotiated is a simple contract debt, and although it imports a consideration, it is open to proof that none in fact existed which is not the case of a specialty."

These doubts as to the soundness of the doctrine here laid down, seem to have originated from the very positive opinion upon this question delivered by Mr. Justice Prentiss in the circuit court of the United States for the district of Vermont, in the above cited case of *Bank of U. S. v. Lyman*, 20 Vt. 666. The note in that case was made payable to "Samuel Jaudon, Req. cashier, or order," and it was held that the bank of which Jaudon was cashier was not the proper party plaintiff. The learned judge reviewed and commented upon the following decisions: *Beckham v. Drake*, 9 Mees. & Wels. 78; S. C. 11 Id. 315; *Evans v. Cramlington*, Carth. 5; S. C. 2 Vent. 306; *Fenn v. Harrison*, 3 T. R. 757; *Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East, 7, and *Van Ness v. Forrest*, 8 Cranch. 30; and deduced from them, and especially from the first case cited and from the last, the doctrine that although upon an ordinary simple written contract with an agent the principal might sue, yet by the law merchant only the payee named in a bill of exchange or promissory note could recover thereon. The clearness and vigor of the views expressed by Judge Prentiss justify the insertion of the following extract from his opinion. He said: "To notice particularly all the decisions in the various state courts, having a bearing upon the question one way or the other, would not only take up much time, but be assuming an unnecessary task. I have looked, however, into a very considerable number of these local decisions; and it will be sufficient for every useful purpose, without going farther, to state the purport of such as have been made in the courts of some of the older and more commercial states. The decisions in the courts to which I refer, present three classes of cases. The first is where a promissory note is expressed to be payable, for instance, to A. R., agent of

C. D., both agent and principal being named in the note. In such case it is decided that the principal cannot sue, though named. It is held, that a note payable to a person by name, though described therein as the agent of another, is a note payable to the person so described as agent, and that a suit upon it must be in his name, or in the name of his indorsee. The second class is where a note is made payable to the cashier of a particular bank, giving the name of the bank, without the name of the cashier. In such case it is determined, and very rightly as I think, that the interest and right of action are in the principal who is named, rather than in the agent who is not named. The third class is where a bill or note is made payable to, or is signed by, a person designated agent generally, as A. B., agent, without naming the principal. In such case it is held that the simple addition of agent, and of course the simple addition of cashier, without any specification whatever of the name of the principal, will not authorize the admission of parol testimony to show who the principal is, and make him a party to the instrument. There may be, and indeed are, decisions in some of the state courts not entirely reconcilable with the doctrine of the authorities which have been cited and referred to; but, however much such local decisions may be entitled to consideration and respect on account of the source from which they proceed, they can have no influence upon the question before us, so far as they are at variance with the general prevailing rule of commercial law. In suits in the courts of the United States, as is laid down in *Swift v. Tyson*, 16 Pet. 1, the true interpretation and effect of contracts and other instruments of a commercial nature are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Upon the whole it appears to me that the true rule of law, as deducible from the adjudged cases, American as well as English, is that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appear upon its face to be a party to it. A promissory note, according to the expression of very great judges, partakes in some measure of the nature of a specialty, importing a consideration and creating a debt or duty by its own proper force. Being assignable, and passing by mere indorsement, it is necessary that the parties to it should appear and be known by bare inspection of the writing; for it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities, and on these considerations, that it is distinguished from written simple contracts in general, and made subject to a different rule."

The doctrine of the principal case came again under review in *Johnson v. Catlin*, 27 Vt. 87, where Bennett, J., dissented, from the reasoning upon which the decision was based in very strong terms. In the course of his opinion he said: "At somewhat of an early day, in the case of *Arlington v. Hinds*, 1 D. Chip. 431, it was held that where the note was given to Luther Stone, town treasurer, or his successor in office, the action might be maintained on it in the name of the town of Arlington, and, in that case, the position was advanced by the judge, who gave the opinion of the court; that, though the action might be maintained in the name of the town, yet it would not follow but what Stone might, also, have the action in his own name. The principles of that case have been followed in several subsequent cases. The case in Chipman arose under somewhat peculiar circumstances, and the court must have been pressed with the necessity of sustaining that action to prevent a failure of justice in that particular case, and the court found it necessary to assume that the law merchant was not adopted in this state, in order to avoid the effect of the position that, upon commercial paper, the person who ap-

pears upon the face of the paper to have the legal interest, must sue, and that you cannot resort to matter *aliunde* the note to determine who may sue upon it. But it has long been settled in this state, that the law merchant was a part of our law, so that it now appears that the very ground upon which the case of *Arlington v. Hinds* was based, has been long since swept away. If the principles which are applicable to the case of principal and agent could have been rightly applied to the case of *Arlington v. Hinds*, it might have been sound. In such case it is familiar law, that, the action may be brought in the name of the principal from whom the consideration moves, or in the name of the agent with whom the contract was ostensibly made. Though this court have been repeatedly called upon to repudiate the case of *Arlington v. Hinds* as being a departure from the principles of the law merchant, they have hitherto declined, and subsequent decisions have been made upon the authority of that case, which would seem to be opposed to the current of the cases, which have been decided upon the principles of the commercial law. It may be a matter of some importance that there should be a uniformity of decision on commercial questions in the different states, and how long our courts will adhere to the authority of the case of *Arlington v. Hinds*, for the sake of preserving uniformity in our own decisions, though it mars the symmetry of the commercial law, must depend upon the subsequent adjudications of this court."

It is to be noted, however, that the views thus expressed were in reality, *obiter dicta* since the question before the court was simply, whether upon a bill of exchange payable to "M. Johnson, cashier, or order," the said cashier could maintain an action in his own name, the consideration having been advanced by the bank of which he was cashier. It was obviously unnecessary to determine whether an action upon this bill would also lie in favor of the bank. It is, also, worthy of remark that the point upon which so much stress is laid both in the principal case and in *Johnson v. Catlin*, as to whether the law merchant prevails in Vermont, seems to have been immaterial to the decision here made, for the note of Hinds upon which the present action was brought was not a negotiable instrument, within the law merchant. Indeed the fact, that it was made payable to "Luther Stone or his successors in office" seems to indicate that it was not to be negotiated or transferred by Stone. How can the principles of the law merchant be applied to such a note?

THE VERMONT DOCTRINE, as deduced from adjudged cases, seems to be that where a note is made payable to one as agent for another, who advances the consideration, an action upon it may be maintained either by the principal or by the agent. It was held, however, in *Binney v. Plumley*, 5 Vt. 500, that where a promise was made to certain persons as trustees of the New Market and Kingston Wesleyan Academy "and their successors," the action would lie only in favor of the trustees: 1. Because there was no proof of the existence of any corporation of that name; and, 2. Because there was a distinction between trustees and "mere servants or agents," and therefore the doctrine of the principal case did not apply. It was held, also, in *Dowser v. Tucker*, 31 Vt. 204, that the doctrine did not apply where a note was made payable to a certain person, or bearer, upon a contingency, and was intended to be delivered to a creditor of the payee, it not appearing that there was any relation of principal and agent between the parties, or that there was any present consideration moving from the intended beneficiary. It was therefore determined that such beneficiary could not maintain the action. And the general rule is in that state that where a promise is made for the benefit of a third person, he cannot sue on it, unless the promise

was made to him or the consideration was furnished by him, particularly if it does not clearly appear that payment was to be made to him: *Tuttle v. Collin*, ante, 691, and note.

RULE OF PRINCIPAL CASE SOUND.—The decision in the principal case, both as to the right of the principal to maintain the action and as to the admissibility of parol evidence to identify the principal, if the contract is ambiguous in that particular, is in accordance with the opinion of Mr. Daniel, in his admirable work on Negotiable Instruments, sec. 1187, where he says: "Upon the theory that the party entitled to sue is the one in whom the instrument shows the legal title to exist, it has been held that when the bill or note is payable to a certain person by name, but describing him as agent of another person also named, as for instance, 'A. B., agent for C. D.,' the suit must be brought in the name of the agent, and cannot be brought in the name of the principal; and that *a fortiori* must the suit be so brought when the instrument is simply payable to 'A. B., agent,' no principal being named. But in either case, the better doctrine, as it seems to us, is that either the agent or the principal might sue. If suit were brought by the agent, the possession conforming to the express indication of the paper would clearly sustain the action. If suit were brought by the principal whose name is expressed in the instrument, possession by him would be evidence that he had received from his agent the instrument of which he was entitled to the beneficial interest; and there could be no good reason why it should be necessary for the principal to continue to use his agent's name, when it is clear from the face of the paper that if so used, it would be as the representative of his own. And where the principal is undisclosed on the face of the paper, he might also sue in his own name; but in such case mere possession of the paper would not be sufficient evidence that he was the principal intended, and it would be necessary for him to supply that element in his title to recover, by parol proof. In the case of instruments, payable to bank cashiers, it might be different."

AS APPLIED TO NOTES TO CASHIERS of banks, and to the agents of other corporations, the rule here laid down is supported by the soundest reason, as well as by the decided weight of recent adjudged cases. Mr. Daniel says, sec. 1188, that "the authorities now greatly preponderate in favor of the doctrine," that in such cases, the suit may be brought in the name of the agent, or it may be brought in the name of the principal, and, that if he be not named, "evidence *aliunde* is admissible to show who the principal is." The application of this doctrine to contracts made with the agents of corporations is particularly necessary, because such institutions can only act by their agents.

The right of the principal to sue on such contracts, and the admissibility of extrinsic evidence to identify the principal, have in their support the high authority of the supreme court of the United States. In the case of *Baldwin v. Bank of Newbury*, 1 Wall. 234, the note was payable "to the order of O. C. Hale, Esq., cashier," without saying of what bank, and the question was whether evidence *aliunde* was admissible to show what bank was meant, and also whether the bank could bring the action. Mr. Justice Clifford delivered a very learned opinion upon this question, the greater part of which is here inserted. After commenting upon some other features of the case, he proceeded as follows: "Promise, as appears by the terms of the note, was to O. C. Hale, cashier, and the question is, whether parol evidence is admissible to show that he was cashier of the plaintiff bank, and that in taking the note

he acted as the cashier and agent of the corporation. Contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general he is the officer who superintends the books and transactions of the bank under the orders of the directors. His acts within the sphere of his duty are in behalf of the bank, and to that extent he is the agent of the corporation. Viewed in the light of these well known facts, it is clear that evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument. Where a check was drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or a private act, this court held in the case of *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, that parol evidence was admissible to show that it was an official act. Signature of the promisor in that case had nothing appended to it to show that he had acted in an official character, and yet it was unhesitatingly held that parol evidence was admissible to show the real character of the transaction. Opinion in that case was given by Mr. Justice Johnson, and in disposing of the case he said that it is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency. Rules of form, in certain cases, have been prescribed by law, and where that is so those rules must in general be followed, but in the diversified duties of a general agent the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated, and those powers, says the learned judge, are necessarily inquirable into by the court and jury. Maker of the note in that case had signed his name without any addition to indicate his agency, which makes the case a stronger one than the one under consideration.

"Same rule as applied to ordinary simple contracts has since that time been fully adopted by this court. Examples of this kind are to be found in the case of the *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. 381, and in the more recent case of *Ford v. Williams*, 21 How. 239, where the opinion was given by Mr. Justice Grier. In the latter case it is said that the contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein. Parol proof may be admitted to show the real nature of the transaction, and it is there held that the admission of such proof does not contradict the instrument but only explains the transaction. Such evidence, says Baron Park, in *Higgins v. Senior*, 8 M. & W. 844, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another, by reason that the act of the agent is the act of the principal. Argument for the defendant is, that the doctrine of those cases can have no application to the present case, because the suit is founded upon a promissory note, but the distinctions taken we think cannot be sustained under the state of facts disclosed in the agreed statement. Mr. Parsons says, if a bill or note is made payable to A. B., without any other designation, there is authority for saying that an action may be maintained upon it, either by the person therein named as payee, or by the bank of which he is cashier, if the paper was actually made and received on account of the bank, and the authorities cited by the author fully sustain the position: *Fairfield v. Adams*, 16 Pick. 381; *Shaw v. Stone*, 1 Cush.

254; *Barnaby v. Newcombe*, 9 Id. 46; *Wright v. Boyd*, 3 Barb. 523. Among the cases cited by that author to show that the suit may be maintained by the bank, is that of the *Waterliet Bank v. White*, 1 Den. 608, which deserves to be specially considered. Note in that case was indorsed to R. Olcott, Esq., cashier, or order, and the suit was brought in the name of the plaintiff bank, of which the indorsee was cashier. Objection was made that the suit could not be maintained in the name of the bank, but it appearing that the indorsement was really made for the benefit of the corporation, the court overruled the objection and gave judgment for the plaintiff: *Bayley v. Onondaga Ins. Co.*, 6 Hill, 476. Suggestion was made at the argument that the rule was different in Massachusetts, but we think not. On the contrary, the same rule is established there by repeated decisions, which have been followed in other states: *Eastern R. R. Co. v. Benedict*, 5 Gray, 561; *Folger v. Chase*, 18 Pick. 63; *Hartford Bank v. Barry*, 17 Mass. 94; *Long v. Colburn*, 11 Id. 97 [6 Am. Dec. 160]; *Swan v. Park*, 1 Fairf. 441; *Rutland etc. R. R. Co. v. Cole*, 24 Vt. 33. Doubt cannot arise in this case that the person named in the note was in fact the cashier of the plaintiff bank, because the fact is admitted, and it is also admitted that the plaintiff can prove that in taking the note he acted as the cashier and agent of the corporation, provided the evidence is legally admissible. Our conclusion is, that the evidence is admissible, and that the suit was properly brought in the name of the bank."

The following cases fully support the doctrine that the principal may sue upon such a contract: *Southern Life Ins. and Trust Co. v. Gray*, 3 Fla. 262; *Garton v. Union City Bank*, 34 Mich. 279; *Pratt v. Topeka Bank*, 12 Kan. 570; *Alston v. Hartman*, 2 Ala. 699; *Gilmore v. Pope*, 5 Mass. 491; *Commercial Bank v. French*, 21 Pick. 486; *N. Y. African Soc. v. Varick*, 13 Johns. 38; *Bank of Genesee v. Patchin*, 19 N. Y. 312; *Bank of New York v. Bank of Ohio*, 29 Id. 619; *First Nat. Bank of Angelica v. Hall*, 44 Id. 395. The following, which it will be observed are all comparatively early cases, maintain that the right of action in such cases belongs only to the nominal payee, and that the addition of "cashier," "agent," etc., is mere *descriptio personae*: *Horah v. Long*, 4 Dev. & B. 274; *Ross v. Laffin*, 2 Speers, 424; *Van Ness v. Forrest*, 8 Cranch, 30. In *Clap v. Day*, 11 Am. Dec. 99; and *Buffman v. Chadwick*, 8 Mass. 103, the right of the agent to sue is maintained, but it is not said that this right is exclusive of that of the principal.

NOTES MADE TO PUBLIC OFFICERS, that is to say, to officers of the state or government, or of municipal corporations present still stronger grounds for the application of the rule that the principal may sue. Indeed, in many cases, it is held that the principal only can sue, except where the statute otherwise provides. Such officers are not mere agents. Their rights, powers and duties are marked out by law, and it is only within the prescribed limits that they can bind the government or municipal corporation which they represent. And within those limits they have a strictly representative character. Whatever they do within the appropriate sphere of official action is done for the principal; whatever they receive, is received for the principal. They are not personally liable on contracts made in their official capacity, and for similar reasons they cannot acquire any personal interest in such contracts. On these grounds it was held in *Irish v. Webster*, 5 Greenl. 171, that where a note was made to "James Irish, state's agent, or his successor in office," for timber purchased from the state, the state and not the agent was the proper party plaintiff. Mellen, C. J., in discussing the question, used the following language:

"If there is a want of clearness on the subject under consideration, and if some of the cases are but faintly distinguished from others, touching the question in what instances an agent may sue in his own name, on a promise made to him as such, public policy seems to require that an agent of the state should make his contracts not in his own name, but in the name of the state, and that all securities he may receive should be made payable to the state; and that where they have been made payable to him as agent, the suit should be in the name of the state. The statute which was referred to giving power to treasurers of counties, towns, and parishes to sue in their own names, bonds given to them, as such, or to their predecessors in office, seems to imply that without the aid of the statute such actions could not be sustained."

To the same effect are: *State v. Boies*, 11 Me. (2 Fairf.) 474; *Trustees v. Parks*, 10 Id. (1 Fairf.) 441; *Hunter v. Field*, 20 Ohio, 340; *Dugan v. United States*, 3 Wheat. 172; *United States v. Boice*, 2 McLean, 352; *Board of Supervisors v. Hall*, 42 Wis. 59; see, also, a valuable note to sec. 176 of Dillon on Mun. Corp. In *Fisher v. Ellis*, 3 Pick. 321, where the note was made payable to the "treasurer of the third parish in Dedham, or his successor in office," it was held that either the treasurer or the parish might sue. In this, as in the principal case, and in many others of those cited, the use of the words "or his successor in office" indicated unmistakably that the promise was not to the officer personally. The right of the principal to sue in such cases rests on unquestionable ground: Daniel on Neg. Inst. sec. 1188.

It is thus seen that the decision in the principal case is good law, notwithstanding the doubts cast upon it in Vermont. The statement made that the law merchant does not prevail in Vermont is not in accordance with later cases; but that position is not essential to the support of the decision.

HUNTINGTON v. LYMAN.

[D. CHIPMAN, 438.]

PARTNERSHIP LIABILITY.—Where the party seeking to charge the partnership is apprised that the transaction is not for or on account of the firm, that the credit is not for their benefit, and the act is not in the usual course of business, *prima facie*, the firm is not holden.

GIVING CREDIT TO PARTNERSHIP.—It is not necessary to secure a person giving credit to a partnership that he should know or believe that each individual of the firm would approve the transaction, but it is necessary that he should not know that the debt attempted to be secured, was not the debt of the partnership, or the property sold was not to inure to their benefit, in the absence of all proof of the assent or approbation of the party to be charged.

MOTION for a new trial in an action of assumpsit on a promissory note. The facts sufficiently appear from the opinion. A verdict had been found for the plaintiff pursuant to the directions of the court.

Bennet, for the defendants.

D. Robinson and Merrill, contra, contended that the defendants, as partners, were liable on the note executed in the partnership name, and that the exception to the rule, in the case where the person taking the paper, knew it not to be on a partnership account, was a question of fraud, which must clearly be proved, in order to exonerate the company: 7 East, 210; *Riddle v. Tylor*, 13 Id. 175; *Livingston v. Roosevelt*, 4 Johns. 251 [4 Am. Dec. 273]; *Doty v. Bates*, 11 Id. 554; Chitty on Bills, 45 Camp. 185.

By Court, SKINNER, C. J. This action is founded on a note of hand, executed in the name of Henry Lyman & Co., to Daniel Huntington, the plaintiff. The firm of Henry Lyman & Co. consisted of Henry Lyman, of Shaftsbury, and Clarinda Boardman, of Troy. The consideration of the note was a horse, sold by Huntington. At the trial, the counsel for the defendants, or rather for Mrs. Boardman, resisted a recovery on the ground that the partnership was for such mercantile purposes as usually appertain to a country store, and did not extend to the purchase and sale of horses; and, also, that the plaintiff, at the time of taking the note, knew the debt was not the debt of the partnership, but the purchase of the horse was by Cornelius Clarke, a third person, and for his benefit, or for that of himself and Lyman. To oppose the first part of the defense, the plaintiff relied on proving that the partnership had been extended, by the transactions of the partners, to the purchase and sale of horses upon credit, and thereby he was authorized to take the note. And from the case, as allowed, it would seem, that the attention of the court was wholly drawn to the testimony upon this point, and that the other ground was overlooked in directing a verdict for the plaintiff. Whether the testimony was sufficient to justify the court in directing a verdict upon the question of the extension of the partnership, is not necessary now to examine. In deciding upon this application for a new trial, the attention of the court has been directed to the inquiry: Is the plaintiff entitled to recover, if he knew at the time of taking the note, that the contract was not for the benefit of the partnership? Was there evidence given to the jury tending to prove this, and which they ought to have weighed?

In the case of *Arden v. Sharp and Gilson*, although there was no proof direct that the transaction was known to the plaintiff to be for the sole benefit of Gilson, one of the partners, Lord Kenyon says: "When the party who brings the action took the

bill, with the indorsement of one partner only (Gilson indorsed in the name of the firm), and was informed that the transaction was to be concealed from the other, he cannot sue the partnership; the transaction indicates that the money was for the partner's own use, and was not raised on the partnership account." The same judge again says, in the case of *Wells v. Masterman*, "If a man, who has dealings with one partner only, draws a bill on the partnership, on account of those dealings, he is guilty of a fraud; and in his hands the acceptance made by the partner is void." The doctrine here expressed is, a knowledge that the dealing is not for the firm renders the security fraudulent and void. In the first case the circumstance of the partners having requested the transaction concealed, without other evidence, was considered sufficient to establish both facts; that is, that it was not for the firm, and knowledge thereof in the party. In the case of *Sheriff v. Wilks*, the same principle is fully recognized by the whole court, and in many other cases. The case of *Ridley v. Taylor*, which is much relied on by the counsel for the plaintiff, cannot be considered as opposed to this principle. Lord Ellenborough, in delivering the judgment in that case, says: "If this were distinctly the case of a pledging, by one partner, of the partnership security for his own separate debt, without the authority of the other, we should have no hesitation in pronouncing a bill, drawn under such circumstances, void," etc.

The law we believe to be settled that where the party seeking to charge the partnership is apprised that the transaction is not for or on account of the firm; that the credit is not for their benefit, and the act is not in the usual course of business *prima facie*, the firm is not held. The *onus probandi* then falls upon the plaintiff. He must show the authority or approbation of the party attempted to be charged: 1 Salk. 126; 1 East, 49; 4 John. R. 251; 2 Esp. 525, 731; 8 Ves. 544; Liv. D. 342. The remaining inquiry is, was there testimony given to the jury tending to prove Huntington's knowledge? And of this no doubt can be raised. If the testimony of Barlow is to be credited, and of its credibility the jury ought to have been permitted to decide, not only knowledge, but *corin* is fairly inferable from the whole transaction. The horse, he says, was purchased for Clarke, and to mate one that he owned, and this understood by Huntington at that time. The note of Clarke, indorsed by Lyman, or of Clarke and Lyman jointly, was executed. Huntington wished a new note drawn and signed by

Lyman in the name of the firm, which was done, and the first note destroyed. If the credit of Clarke, or Clarke and Lyman, were good, it would have been relied upon; but if not, and the credit of Mrs. Boardman was demanded, there ought to have been evidence of her consent, express or implied. But so far from this, the evidence not only shows that Huntington knew it was not a partnership concern, but on the contrary, from the execution of the first note by Clarke and Lyman, it was fairly to be inferred that neither the usual course of business, nor any assent of Mrs. Boardman, would warrant the attempt to charge her. From the facts the jury might very naturally conclude that Huntington was persuaded, that if Mrs. Boardman was charged, it must be effected without her knowledge or consent. She resided at a distance from the store where the business of the partnership was transacted, and her capital constituted the means employed.

It is not necessary to secure a person giving credit to a partnership that he should know or believe that each individual of the firm would approve the transaction; but it is necessary that he should not know that the debt attempted to be secured was not the debt of the partnership, or the property sold was not to inure to their benefit, in the absence of all proof of the assent or approbation of the party attempted to be charged.

The verdict, therefore, must be set aside, and a new trial granted.

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CONSIDERATION.

1. WHERE A CONSIDERATION IS EXPRESSED in a deed, the grantor or his successors in interest cannot aver or prove that there was no consideration, but they may show that the consideration was vicious and illegal, and to rebut this the grantee may prove a legal consideration different from that expressed. *Chiles v. Coleman*, 396.
2. A DEED IMPLIES A CONSIDERATION, and, if unexpressed, it may be shown by parol what the consideration was. *McClanahan v. Henderson*, 412.
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4. A DEED, from the solemnity of the seal, is presumed to be upon a good consideration. *Cusack v. White*, 669.
5. DEED TO A WIFE is good unless the husband dissented. His assent may be presumed where the deed is clearly for her benefit. *Id.*
6. FUTURE COHABITATION. — A contract made in consideration of future illicit cohabitation is void. *Id.*
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3. **PRESUMPTION OF.**—The consideration of a deed, although the grantor and grantee were living in adultery, will be presumed to be good. *Id.*

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See CRIMINAL LAW, 7.

CONSTITUTIONAL LAW.

1. **RETROSPECTIVE STATUTE.**—An act of the legislature releasing a penalty accruing to a county, after verdict and before judgment, is constitutional, being neither an *ex post facto* law, nor a law impairing the obligation of contracts, and it may be pleaded *puis darrein continuance*. *Coles v. County of Madison*, 161.
2. **LAWS IMPAIRING CONTRACTS.**—The constitutional provision, that "no law impairing the validity of contracts shall ever be made," extends to all rights arising under all contracts, whether written or parol, whether express or implied, whether arising from the stipulation of the parties or accruing by operation of law. *Lewis v. Brackenridge*, 228.
3. **IDEM.**—This constitutional provision must be considered as rendering void any statute which is retrospective and which destroys a vested right of action arising *ex contractu*. But the legislative power of limiting the time, and regulating the manner in which rights shall be legally demanded, does not interfere with the rights themselves nor affect the construction given to that provision. *Id.*
4. **STATUTES, HOW TO OPERATE.**—It is a general rule, independently of the constitution, that statutes are to have a prospective operation only, and it is conclusively settled that a statute should not be construed to operate retrospectively, if a vested right be thereby destroyed. *Id.*
5. **THE UNDERTAKING OF SPECIAL BAIL** is that the principal shall satisfy the judgment of the court or render his body in execution, or that the bail will do it for him. And if the principal fail to satisfy the judgment and cannot be found, the bail becomes absolutely liable for the amount of the judgment. *Id.*
6. **JUDGMENT-CREDITOR'S RIGHT AGAINST BAIL VESTED.**—When the bail are absolutely fixed and have no further time, the right of the judgment creditor to his debt from them is a vested right, arising *ex contractu*, of which no subsequent legislative act can divest him. Accordingly an act authorizing the surrender of the principal in discharge of the bail at any time before judgment against them can have no retrospective operation, but must be construed to apply to cases only arising subsequently to the statute. *Id.*
7. **CONSTITUTION OF UNITED STATES.**—The provision of the constitution of the United States providing that no person shall be twice put in jeopardy for the same offense, is binding on the state courts. *State v. Moor*, 541.

CONTEMPT.

THE POWER TO PUNISH FOR CONTEMPT exists in all courts, independently of the statute, and its exercise rests in the sound discretion of the court, and is not reviewable elsewhere; but if it be used maliciously, or oppressively, the remedy is by indictment or impeachment of the judge or magistrate. *Clark v. People*, 177.

CONTINUANCE.

See PLEADING AND PRACTICE, 6, 8.

CONTRACTS.

1. THE LAW OF A PLACE WHERE A CONTRACT IS MADE must determine its construction and validity. Therefore, a plea in avoidance of a note made in another state, on the ground of unlawful consideration, must aver that the object for which it was given was prohibited by the laws of that state. *Bradshaw v. Newman*, 149.
2. A PLEA OF FAILURE OF CONSIDERATION must state how it has failed. *Id.*
3. WAIVER OF STRICT PERFORMANCE.—Where a contract for the conveyance of land does not specify any particular time of performance, but stipulates that the deed shall be made when the money is paid, if the vendee pays the money and neglects to demand a conveyance, or on the vendor's offer to convey, refuses to accept, and says that he will call for the deed when he wants it, the vendor's failure to convey at the time of payment is thereby waived. *Baker v. Whitesides*, 168.
4. A PROMISE TO PAY FOR IMPROVEMENTS made by the plaintiff upon government land which the defendant purchased from the United States after the improvements were erected, is *nudum pactum*, and will not support an action on such promise, although in consequence thereof the plaintiff surrendered the possession to the defendant. *Boston v. Dodge*, 205.
5. A CONTRACT TO CONVEY TO A STRANGER will, in general, be construed to be an undertaking on the part of the person contracting to convey, that the stranger shall accept the conveyance; and an offer or tender to convey will not be equivalent to an actual performance, as it would be where the conveyance is to be made to a party to the contract. *Davis v. Parish*, 287.
6. REVIVING CONTRACT.—A contract for the sale of land which has by its terms expired cannot be revived by parol. *Id.*
7. MISREPRESENTATION AVOIDING CONTRACT.—A misrepresentation by the vendor of a saltpeter cave, of the amount of saltpeter which a given quantity of nitrous earth will produce, will authorize the rescission of the contract of sale. *Perkins v. Rice*, 298.
8. *IDEM*.—And if the misrepresentation is clearly established, it will not alter the vendee's right of recovery, that after the representation he employed a person, in whom he had confidence, to examine the cave, and such person reported favorably. *Id.*

2. **RESCISSON OF CONTRACT FOR FRAUD.**—Where a contract is rescinded on the ground of fraud, equity will decree that the fraudulent party repay what he has received, together with interest. *Id.*
 10. **A MORAL OBLIGATION TO DO AN ACT** will support an agreement to perform, and equity will not grant relief on the ground that the party made the agreement wrongfully, believing that he was legally obliged to perform. *Cardwell v. Strother*, 326.
 11. **A CONTRACT IN VIOLATION OF LAW** is void, and the courts will neither enforce payment nor enable one who has paid money thereon to recover it if both parties are *in pari delicto*; but if the law violated was intended to protect one of the parties against the acts of the other, they are not *in pari delicto*, and the party designed to be protected may recover money paid in violation of such law. *Gray v. Roberts*, 383.
 12. **IF DISTINCT CONTRACTS FOR UNDIVIDED MOITIES** of a tract of land be made, though one of them should be vacated, the other, if fair, should be permitted to stand. *Carneal v. May*, 453.
 13. **INTOXICATION** will avoid a contract, if it is so extreme that the party sought to be charged was incapable of clearly perceiving or assenting. *Wade v. Colbert*, 652.
- See ACTIONS; CONSTITUTIONAL LAW, 2; EMPLOYER AND EMPLOYEE; EQUITY, 1; SPECIFIC PERFORMANCE; VENDOR AND VENDEE, 7, 9, 11.**

CORPORATIONS.

1. **COUNTIES ARE PUBLIC CORPORATIONS** subject to complete legislative control. *Coles v. County of Madison*, 161.
2. **EFFECT OF SEIZURE OF CORPORATE FRANCHISES.**—A seizure of the franchises of a corporation effects its dissolution. *State Bank v. State*, 234.
3. **ABUSE OF CORPORATE FRANCHISES** works a forfeiture of the franchises, but not of the lands or chattels of the corporation. *Id.*
4. **A JUDGMENT OF SEIZURE OF THE FRANCHISES** for a violation of the charter of a corporation should not direct a seizure of the corporate possessions. The better opinion is that such a judgment does not dissolve the corporation, though the seizure of the franchises by execution issued upon the judgment may work such dissolution. *Id.*
5. **THE EFFECT OF THE DISSOLUTION OF A CORPORATION**, at common law, was: 1. That its lands and tenements reverted to the person by whom they were granted to the corporation; 2. Its goods and chattels vested in the crown; 3. The debts due to and from it were extinguished. *Id.*
6. **A BANK RESTRICTED BY ITS CHARTER** to dealings in commercial paper, is not thereby prohibited from taking an assignment from a vendor of real estate of the purchaser's agreement to pay the purchase-money, where the taking of such assignment is necessary to secure a debt previously contracted. *Lagow v. Badollet*, 258.
7. **SUIT BY FOREIGN CORPORATION** may be maintained in the courts of this state. *Williamson v. Smoot*, 494.

3. ATTACHMENT AGAINST CORPORATE PROPERTY cannot be maintained in an action against a stockholder. *Id.*

See AGENCY, 1; MUNICIPAL CORPORATIONS.

COVENANTS.

- To DEFEND.—A confession of judgment by one bound by a covenant to defend the suit with good faith, is not a breach of the covenant where it appears that no available defense could have been made at law. *Cardwell v. Strother*, 326.

CRIMINAL LAW.

1. AN INDICTMENT NOT INDORSED "a true bill," with the name of the foreman of the grand jury signed to such indorsement, as prescribed by statute, is a nullity. *Nomaque v. People*, 157.
2. ALLOWING JURORS TO SEPARATE.—The jurors in a criminal case should not be permitted to go at large after they are sworn until they are finally discharged. *Id.*
3. BIAS OF JURORS AS GROUND FOR NEW TRIAL.—The fact that one of the jurors in a criminal case had made up his mind against the prisoner, though he swore that he had formed no opinion, if discovered and shown by affidavit after the trial, will furnish ground for a new trial. *Id.*
4. THE JURY MUST BE PRESENT when their verdict is delivered in court, in order that the prisoner may have them polled, and the verdict is not final until pronounced and recorded. *Id.*
5. NO IRREGULARITIES ARE WAIVED IN A CAPITAL CASE, for the prisoner is considered as standing on all his rights. Hence, if by agreement between his counsel and the prosecutor the jury return their verdict to the clerk, and it is delivered in court in their absence, the prisoner is entitled to a new trial, notwithstanding such agreement. *Id.*
6. LARCENY CANNOT BE COMMITTED OF GOODS FOUND in the highway, bearing no marks by which the owner can be ascertained, for there is no felonious taking. *Tyler v. People*, 176.
7. CONFESSIONS OF CONSPIRATORS.—The fact of conspiracy cannot be established by the confessions of one that others had conspired with him; but when the conspiracy is proved by other evidence, the confessions of one of the conspirators will be admissible against the others. *Metcalfe v. Connor*, 340.
8. JEOPARDY.—When the jury is necessarily discharged without giving a verdict, the defendant has not been so in jeopardy as to prevent his again being put on trial. *State v. Moor*, 541.
9. PUTTING A PRISONER ON HIS TRIAL.—If, after swearing certain jurors, it is found that the remainder cannot be procured, the prisoner is not so put upon his trial as to be entitled to his discharge. *State v. Burk*, 662.

DAMAGES.

1. CONTRACT TO DELIVER GOODS.—On the breach of a covenant to deliver personal property before any payment is made, the measure of damages

is, as a general rule, the difference between the price stipulated and the value of the goods at the time they were to be delivered. *Caldwell v. Reed*, 314.

2. ON A BREACH OF THE COVENANT OF WARRANTY, the measure of the damages is the value of the land at the time of the contract of which value the consideration agreed to be paid therefor is the best evidence. *McKean v. Reed*, 318.
3. ON A PENAL BILL, an action for the sum actually due may be maintained without any reference to the penalty. *Holley v. Holley*, 342.

See PLEADING AND PRACTICE, 3; SPECIFIC PERFORMANCE, 2.

DEEDS.

1. "MORE OR LESS" IN DEED.—Where a written agreement for the sale of a tract of land, described the same as "containing by deed two hundred acres, be the same more or less," and it appeared from a subsequent survey that the tract contained three hundred and fifteen acres, it was held that parol evidence was inadmissible to prove that the parties intended a sale of a less quantity than the entire tract. *Dale v. Smith*, 64.
2. NATURAL BOUNDARIES referred to in a deed are to be followed, although by so doing a greater number of acres than that mentioned may be included. *Id.*
3. TO MAKE A PERFECT TITLE under an order of sale made by the court, the heirs at law of the testator are proper parties, and must be decreed to join in the deed of conveyance. *Lockwood v. Stradley*, 97.
4. A PARTY ACCEPTING A QUITCLAIM DEED of land runs the risk of the goodness of the title, and if it fails, he cannot recover the purchase-money, unless he can show fraud in the sale. *Snyder v. Laframboise*, 187.
5. A DEED NOT DELIVERED AND ACCEPTED, though recorded, is invalid and passes no estate. *Herbert v. Herbert*, 192.
6. A DEED FROM HEIRS PURPORTING TO CONVEY THEIR INTEREST, and not a particular tract of land, simply puts the purchaser in their place, and if they could not recover he cannot. *Chiles v. Coleman*, 396.
7. A VALUABLE CONSIDERATION MUST BE EXPRESSED in a deed of bargain and sale, and its adequacy cannot be questioned between the grantor or his heir and the grantee, but only by creditors or purchasers. *Id.*
8. WHEN RECORDED.—A deed of land lying in two counties may be recorded in either. *Conn v. Manfee*, 417.
9. BY GRANTOR OUT OF POSSESSION.—Under the act of 1798, a deed of bargain and sale of land held adversely by another, conveys the title, and the purchaser may maintain a writ of right without having been actually seized. *Id.*
10. A RELEASE, purporting to have been made on valuable consideration, and containing words sufficiently comprehensive, will operate as a deed of bargain and sale. *Id.*
11. TENDER OF CONVEYANCE is unnecessary where the other party had declared his unwillingness to accept it. *Lynch v. Postlethwaite*, 495.

12. **MISTAKE IN A DEED.**—Parol evidence is not, where there is no charge of fraud, admissible to show a mistake in the number of acres mentioned in a deed. *Kerr v. Calvit*, 537.
13. **MERGER OF AGREEMENT INTO A DEED.**—When a deed is made in pursuance of a prior agreement, the agreement is thereby made a nullity, and the rights of the parties are controlled by the deed. *Id.*
14. **PROOF OF CONSIDERATION.**—In the absence of fraud, the consideration of a deed cannot be impeached by parol evidence having relation to a period anterior to the delivery of the deed. *Id.*
15. **METES AND BOUNDS.**—In a purchase of land by metes and bounds, purporting to contain a specified number of acres, more or less, the metes and bounds, and not the number of acres, control. *Peay v. Briggs*, 656.
16. **VISIBLE BOUNDARIES.**—When the metes and bounds are represented by visible marked lines, they cannot be extended, although a natural or artificial boundary is called for beyond. *Id.*
17. **THE DESTRUCTION OF A CONVEYANCE** cannot divest the title of the grantee, though done for that purpose with his consent. *Sally v. Sandifer*, 687.

See CONSIDERATION, 1, 2, 3, 4, 5; SHERIFFS, 1; TENDER, 2.

DELIVERY.

See CONFLICT OF LAWS, 27; DEEDS, 5; SALES, 1.

EJECTMENT.

1. **PLEADING OUSTER IN EJECTMENT.**—In the declaration in ejectment the demise was laid to have been made in October of a certain year, and the ouster to have taken place afterwards, to wit, in April of the same year. The declaration was held good and the *scilicet* repugnant and void. *Armstrong v. Jackson*, 225.
2. **UNDER SHERIFF'S DEED.**—If the defendant in execution was never in possession of the property sold, the purchaser in an action against a stranger must put his whole title in evidence. *Toomer v. Purkey*, 634.

See FERRIES.

EMPLOYER AND EMPLOYEE.

CONTRACT FOR SERVICES.—One who contracts to serve another for a specified period, cannot recover anything for serving a less period, when he terminates his service without the consent or fault of his employer. *Mortmain v. Lafauz*, 485.

EQUITY.

1. **IN THE ABSENCE OF FRAUD**, accident or mistake, a court of equity will not relieve against a contract void at law. Nor will equity relieve a party against the consequences of a risk voluntarily assumed by him. *Ross v. Singleton*, 86.

2. **FULL RELIEF IN EQUITY IS GIVEN** to prevent a multiplicity of suits, where an injunction has issued to restrain a wrong, but this principle is limited to cases where a right to relief exists for injury already done, independently of the injunction to prevent future injury. Accordingly a judgment-creditor who sues out an injunction to restrain waste upon land covered by the lien of his judgment, and pending the injunction purchased the land at the sheriff's sale, cannot recover for the waste committed prior to his purchase. *Hughlett v. Harris*, 104.
3. **GRANTING A REHEARING IN EQUITY** does not *per se* vacate the decree, but simply opens it for reversal, alteration or correction; and if no rehearing be had either by reason of the dismissal of the order, or by the agreement of the parties duly entered, the original decree stands as if no order for a rehearing had been granted. *Lockwood v. Bates*, 121.
4. **NEGLECT TO MAKE A DEFENSE AT LAW** is a bar to equitable relief. *More v. Bagley*, 144.
5. **PRECEDENCE IN TIME** gives the advantage in right in cases of conflicting equities. *Gallion v. McCaslin*, 208.
6. **RELIEF IN EQUITY** should not be granted further than the complainant's claim is reasonably certain. *Bryan v. Beckley*, 276.
7. **JOINDER OF DISTINCT CAUSES OF ACTION.**—In chancery several complainants cannot unite in one bill to demand several distinct and unconnected matters of one defendant; nor can one complainant demand several distinct and unconnected matters of one defendant. *Richardson v. McKisson*, 308.
8. **IGNORANCE OF THE MEASURE OF DAMAGES** is no ground for relief in equity. *McKean v. Reed*, 318.
9. **RECONVEYANCE BY MORTGAGEE—EQUITY JURISDICTION.**—Where land has been conveyed to secure a loan and a bond taken to reconvey, equity alone can compel a reconveyance after payment of the loan, and the power to adjust the accounts is incident to the jurisdiction. *Breckenridge v. Brooks*, 401.
10. **JURISDICTION IN MATTERS OF ACCOUNT** is concurrent in courts of law and equity, but after a settlement by the parties without error or fraud, and a balance struck, equity has no jurisdiction. *Id.*
11. **A BILL IN CHANCERY SHOULD BE SO CERTAIN** in setting forth the case as to enable the chancellor to pronounce his decree at once; but if relief is sought on a lost paper, and the complainant mistakes his case, the defect may be aided by the answer. *Rankin v. Maxwell*, 431.
12. **ALLEGATIONS IN AN UNVERIFIED BILL** are not evidence against the complainant. *Id.*
13. **EQUITABLE RELIEF WHERE CLAIM IS LEGAL.**—If, by reason of acts of the adverse party, resort is had to equity to enforce a legal claim, no greater relief should be allowed than would be allowed at law. *Forð v. Sproule*, 439.

See **NEW TRIAL**, 2, 3; **SET-OFF**, 4, 6; **STATUTE OF LIMITATIONS**, 8.

ESTOPPEL.

BY STATEMENTS.—A mortgagee who, by representing that the mortgage had been discharged, induces another to take a mortgage of the premises, cannot thereafter set up a claim to the mortgaged property, nor can his assignee with notice to the prejudice of the second mortgagee. *Lasselle v. Barnett*, 217.

EVIDENCE.

1. INJURY TO THE PLAINTIFF'S REPUTATION may be averred and proved by him in an action of trespass *vi et armis* for unlawfully entering his house under the pretense of searching for stolen goods. *Anonymous*, 31.
2. EVIDENCE OF THE CONTENTS of an instrument will not be admitted where it is averred that the writing could not be found and was last seen in the possession of one H. T., but where no evidence that H. T. was dead or beyond seas, or that efforts to obtain his testimony had been made, was offered. *Judson v. Kelava*, 32.
3. THE SEAL AND SIGNATURE of the secretary of the treasury of the United States are sufficient authentication of the official acts of the secretary. *White v. Saint Guirons*, 56.
4. THE ACTS OF CONGRESS, as published in the pamphlet acts of the sessions, may be read in evidence without further proof. *Id.*
5. PAROL EVIDENCE IS INADMISSIBLE in an action against two defendants for the breach of warranty of soundness of a slave, to prove that the slave was sold by both the defendants, it appearing from the bill of sale produced in evidence that the sale was by one only. *Wren v. Wardlaw*, 60.
6. A DEPOSITION IS ADMISSIBLE though notice of taking it be not proved, if it appear that the opposite party was present and cross-examined. *Rogers v. Wilson*, 61.
7. PAROL EVIDENCE OF THE INTENTION of the parties is inadmissible to vary a writing in the absence of surprise, mistake, or fraud. *Dale v. Smith*, 64.
8. THE LAWS OF ANOTHER STATE cannot be noticed judicially; but must be pleaded and proved. *Mason v. Wash*, 138.
9. PAROL VARIANCE OF WRITTEN AGREEMENT.—The time of performance of a written agreement may be extended by parol though the terms cannot be changed. *Baker v. Whitesides*, 168.
10. THE ADMISSION OF IMPROPER EVIDENCE, UNEXCEPTED TO at the trial, is not, as a general rule, a ground for relief in an appellate court. *Snyder v. Laframboise*, 187.
11. WHERE THERE IS A COMMUNITY OF INTEREST AND DESIGN, the declarations of one of the parties are admissible in evidence against the rest. *Id.*
12. COMPETENCY OF GRANTOR AS WITNESS.—A grantor who has made no covenants, and has no interest in a suit relating to the land, is a competent witness. *Herbert v. Herbert*, 192.
13. JUDICIAL NOTICE MUST BE TAKEN of the variation of the magnetic from the true meridian. *Bryan v. Beckley*, 276.

14. JUDICIAL NOTICE MUST BE TAKEN of the laws of a mother state which were in existence at the time of the separation from such state. *Holley v. Holley*, 342.
 15. LAWS OF OTHER STATES are matters of fact to be proved, in accordance with which the rate of interest should be found. The court cannot judicially find the rate of interest of another state. *Id.*
 16. NOMINAL PARTY AS A WITNESS.—One who has been made a party, but who has no interest in the contest, is a competent witness. *Ford v. Sproule*, 439.
 17. FOREIGN LAWS, and the laws of other states, are not judicially noticed but must be proved. *Boggs v. Reed*, 482.
 18. WHAT WITNESSES MUST ANSWER.—A witness may be compelled to answer a question, though by so doing he may make himself liable in a civil action. *Planters' Bank v. George*, 487.
 19. PROOF OF EXECUTION OF DEED.—If the subscribing witness resides out of the state, the deed may be read in evidence on proving his handwriting and that of the grantor. *Lynch v. Postlethwaite*, 495.
 20. CONTRADICTING WITNESS.—A written report made by a witness may be read in evidence to show a discrepancy between his testimony and his prior statements. *Id.*
 21. INTEREST TO DISQUALIFY WITNESS.—A stockholder is not competent to be a witness for the corporation. *Id.*
 22. HEARSAY testimony is not admissible. *Id.*
 23. PAROL EVIDENCE is admissible to prove that a purchase was made with the funds of the principal, although the conveyance was taken in the name of the agent. *Hall v. Sprigg*, 506.
 24. EVIDENCE—ENTRIES IN BOOKS.—In an action against the surety of the teller of a bank, the entries made by the latter in a book kept by him in the bank, are evidence against the surety. *State Bank v. Johnson*, 645.
 25. ADMISSIONS BY AGENT, after he has ceased to act as such, are not evidence against his principal. *Id.*
 26. EVIDENCE AGAINST SURETY.—Admissions of the teller of a bank, made after he had ceased to act as such, are not evidence against his surety. *Id.*
- See AGENCY, 2; CRIMINAL LAW, 7; DEEDS, 12; EQUITY, 12; MISTAKE; MUNICIPAL CORPORATIONS, 2; NEGOTIABLE INSTRUMENTS, 5, 14, 16.

EXECUTIONS.

1. FOR ILLEGAL OR OPPRESSIVE ACTS BY AN OFFICER, in executing process, the remedy is at law, and not in equity. *Beaird v. Foreman*, 197.
2. DEFENDANT'S REQUEST TO LEVY UPON PARTICULAR TRACT.—A defendant in execution desiring a levy upon a particular tract should show the officer all his evidences of title, and the officer is not bound to notice loose memoranda of title. *Id.*

3. **INJUNCTION AGAINST EXECUTION—PARTIAL.**—If a defendant in execution makes the plaintiff and the officer both parties to a bill for an injunction where both do not participate in the levy, the answer of the officer alone is sufficient. *Id.*
4. **EQUITABLE RELIEF AGAINST EXECUTION.**—Executions regular on their face will not be adjudged void in equity, at least until an attempt is made to obtain relief in the court issuing them. *Id.*
5. **OFFICER'S DUTY AS TO LEVY.**—An officer holding an execution should make reasonable exertions to levy it upon the property of the defendant, and he is liable for gross negligence in this respect; his want of knowledge of the defendant's property or the plaintiff's failure to point it out to him will not excuse him. *Hargrave v. Penrod*, 201.
6. **A JUDGMENT-CREDITOR'S REMEDY** against a sheriff for not levying a *f. fa.* is not lost by his discharging the debtor from a *ca. sa.* issued at his instance, though such discharge may satisfy the judgment. *Id.*
7. **CLERICAL ERRORS IN AN EXECUTION** may be amended at the trial of an action against the sheriff for not levying it. *Id.*
8. **FEE-BILLS LIKE EXECUTIONS** are *functi officio* after ninety days, under the Illinois statute. *Id.*
9. **AT A SHERIFF'S SALE OF REALTY**, the title of a *bona fide* purchaser cannot be impeached for any error in the judgment, nor on account of the execution having issued out of season, nor for any fault of the sheriff in not pursuing the statute as respects the inquest, advertisement of sale, etc. But to support his title the purchaser must show the sale to have been authorized by the judgment of a court of competent jurisdiction and by the kind of execution which the statute prescribes. *Armstrong v. Jackson*, 225.
10. **THE EXECUTION DOES NOT ABATE** by the death of the plaintiff after a *fi. facias* has been levied; but a *venditioni exponas* may issue. *Buckner v. Terrill*, 269.
11. **INADEQUACY OF PRICE** is not of itself sufficient to set aside a sale of lands under an execution. *Stockton v. Owings*, 302.
12. **FRAUD IN EXECUTION SALE.**—Where, through the active agency of the purchaser, an execution sale was conducted with secrecy, and with the intention of obtaining the land at a great sacrifice, such sale may be declared fraudulent and void. *Id.*
13. **AN EXECUTION LIEN** is not a right in the property itself, but a right to levy upon the property, to the exclusion of interests subsequently acquired. *Lynn v. Gridley*, 591.
14. **SALE UNDER JUNIOR EXECUTION.**—When a senior writ is in the officer's hands it passes the title free of the elder lien, but the proceeds of the sale must first be applied on the writ having priority. *Id.*
15. **INJUNCTION, EFFECT ON LIENS.**—When an elder execution is suspended by an injunction, its lien is not destroyed thereby, and a sale under a junior writ passes title, subject to its being divested by a sale under the elder lien when the injunction is removed. *Id.*

16. **AMENDMENT OF.**—The omission of the words "lands and tenements," in an execution is a clerical error which may be corrected on motion. *Toomer v. Parkey*, 634.
17. **SALE AFTER RETURN DAY.**—If an execution be levied before the return day the sheriff has authority to sell afterwards. *Id.*
18. **SHERIFF'S SALES, CAVREAT EMPTOR** is the rule; there is no warranty. *Davis v. Murray*, 661.
19. **NOTICE OF SALE** may be waived by the defendant where there are no legal liens on the property. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. A **CLAUSE IN A WILL** directing the executors to sell all the estate of the testator, real and personal, and distribute the proceeds among certain named legatees, vests no estate in the executors, but the real estate descends to the heirs at law. *Lockwood v. Stradley*, 97.
2. **THE TRUST IN THE EXECUTORS** to sell is a personal confidence, and cannot be executed by an administrator with the will annexed. But the trust may be executed by the court, where the property given and the objects to be benefited are certain. *Id.*
3. **CONVEYANCE BY ADMINISTRATOR OUT OF POSSESSION.**—Where an administrator sells and conveys land pursuant to a special act of the legislature, the deed is valid, notwithstanding the fact that the land is in the possession of another who took possession with the administrator's consent. *Herbert v. Herbert*, 192.
4. **IF AN ADMINISTRATOR CHANGE THE NATURE OF THE DEBT** originally due to the intestate, by a contract made with himself, he must sue for the new debt in his own name and not in his representative capacity. *Helm v. Van Vleet*, 248.
5. **STYLING HIMSELF AS ADMINISTRATOR** in the declaration will be considered as *descriptio personæ* merely where the plaintiff has declared on a promise made to himself and has taken judgment in his own name. *Id.*
6. **SUIT BY LEGATEE.**—An executor in Kentucky may authorize a legatee to sue in this state. *Hamilton v. Cooper*, 588.
7. **ADMINISTRATOR'S DEED.**—Where an administrator sells real estate under an order of the probate court, and takes a mortgage of the same or other land to himself as administrator, to secure the purchase-money, a foreclosure of such mortgage vests the estate in him personally, but a subsequent conveyance of the same by him as administrator will pass his title, and the covenants contained in such conveyance will bind him personally. *Higley v. Smith*, 701.

See **STATUTE OF LIMITATIONS**, 10.

FACTORS.

- ACCEPTING THE FINAL ACCOUNT** of a factor, without objection, discharges him from all further liability to account for sales made by him on a credit, the proceeds of which he has not collected. *Rion v. Gilly*, 483.

FALSE IMPRISONMENT.

1. IN AN ACTION FOR FALSE IMPRISONMENT under the pleas of not guilty and justification, the whole of the declarations or admissions at the time of the arrest are admissible in evidence, and must all be received, or the whole must be rejected. *Rogers v. Wilson*, 61.
2. REASON TO SUSPECT that plaintiff was guilty may be proved in mitigation of the damages. *Id.*
3. EVIDENCE OF PLAINTIFF'S BAD CHARACTER adduced on the cross-examination before the committing magistrate may be used by the defendant in the action for false imprisonment. *Id.*

FEMES-COVERT.

1. A MARRIED WOMAN, who, under the belief that her husband is dead, such being the common report, sold certain lands, may recover them in ejectment against the purchaser. And there being no fraud, equity will not relieve. *Ross v. Singleton*, 86.
2. A MARRIED WOMAN cannot, after the death of the husband, be compelled to perfect a contract void in its origin, or one which she was legally incompetent to execute. *Id.*

FERRIES.

FOR FORCIBLY TAKING A FERRY, neither a writ of forcible entry and detainer nor ejectment will lie. *Rees v. Lawless*, 296.

FORCIBLE ENTRY AND DETAINER.

See FERRIES.

FOREIGN JUDGMENTS.

See JUDGMENTS.

FORGERY.

See NEGOTIABLE INSTRUMENTS, 3.

FRAUD.

1. A CONVEYANCE WITH POWER TO SELL certain slaves, pay the proceeds in discharge of four notes, and return the surplus to the grantor, the deed to be void in case the notes are punctually paid, is not fraudulent *per se*, although the grantor remain in possession. *Malone v. Hamilton*, 49.
2. A TOTAL FAILURE OF TITLE on a sale of land, unaccompanied by circumstances warranting the belief that the vendor acted dishonestly, is not *prima facie* evidence of fraud. *Snyder v. Laframboise*, 187.
3. FRAUDULENT PURCHASE THROUGH INNOCENT AGENT.—Where a purchaser of land acts fraudulently in making a purchase, the fact that the agent through whom the purchase is made acts *bona fide*, will not protect the transaction. *Beard v. Campbell*, 362.

4. **INADEQUACY OF PRICE** is not *per se* a sufficient ground for setting aside a contract, but it is a circumstance entitled to great weight as evidence of undue advantage, and that the vendor did not know the value of the property. *Id.*
 5. **SUPPRESSIO VERI** vitiates a contract equally with *suggestio falsi*. *Id.*
 6. **MAKING A PURCHASE THROUGH A THIRD PERSON**, if there is no satisfactory reason for doing so, is a badge of fraud. *Id.*
- See **CONTRACTS**, 1, 2, 3; **EQUITY**, 1; **EXECUTIONS**, 12; **FRAUDULENT CONVEYANCES**; **PARTNERSHIP**, 1.

FRAUDULENT CONVEYANCES.

1. **FRAUD, WHO MAY URGE**.—A deed made to defraud a third person is valid between the parties and cannot be assailed by one who was not injured by it, and who has not succeeded to the rights of any person who was so injured. *Sides v. McCullough*, 519.
2. **VOLUNTARY CONVEYANCES** will not be set aside as fraudulent on the mere allegation that the grantor was largely indebted before and after their execution. Creditors cannot avoid a gift made by their debtor, if it left him with ample means to satisfy their demands. *Miles v. Richards*, 534.
3. **FRAUDULENT TRANSFER**.—A transfer of all his property without consideration, made by one who is much in debt, is fraudulent. *Wade v. Colevert*, 652.

GAMING.

1. **MONEY PAID ON A GAMING CONSIDERATION** cannot be recovered in equity on the ground merely that it was lost by gaming. *Downs v. Quarles*, 337.
2. **A BOND GIVEN ON A GAMING CONSIDERATION** to convey land, does not bind the obligor; but if the bond be assigned to a *bona fide* purchaser for value, and the obligor convey to him, neither he nor his heirs or representatives can afterwards question the consideration, where the statute against gaming vitiates deeds only in the hands of the winner. *Chiles v. Coleman*, 396.

GARNISHMENTS.

- GARNISHEE, DEFENSES BY**.—A person, when garnisheed, is entitled to every defense which he might urge against the defendant in the writ. *Mathis v. Clark*, 688.

GUARANTY.

1. **PROMISE TO PAY THE DEBT OF ANOTHER**.—The signing of articles of separation is a sufficient consideration to support the promise to pay the debt of another. *Hughes v. Creyon*, 663.
2. **ORIGINAL UNDERTAKING**.—If one promises to pay for services to be done for another, this is an original undertaking. *Ayer v. Hay*, 681.

HUSBAND AND WIFE.

See ALIMONY; CONFLICT OF LAWS, 3, 4; CONSIDERATION, 5.

IMPROVEMENTS.

VOLUNTARY REPAIRS placed on the lands of another become a part of the realty, and cannot be removed. *Caldwell v. Eneas*, 681.

See TRUSTS AND TRUSTEES, 8.

INDICAVIT.

See PROHIBITION, 2.

INDICTMENT.

See CRIMINAL LAW, 1.

INFANCY.

WHERE AN INFANT IS PARTY to a suit and a decree is given against him, he should be allowed a day on arriving at maturity, to show cause against such decree. *Lockwood v. Stradley*, 97.

IGNORANCE.

See EQUITY, 8.

INJUNCTIONS.

1. WILL LIE to restrain a tenant by *elegit* from tilling a farm contrary to the established rotation of crops on it, and contrary to the usage of that part of the country. *Wilds v. Layton*, 91.
2. INJUNCTION TO STAY WASTE will not be granted against a defendant in possession under an adverse title. *Poindexter v. Henderson*, 550.
3. IRREPARABLE INJURY will authorize the issue of an injunction, where there is no adequate remedy at law. *Id.*
4. INJUNCTION AGAINST TRESPASS may be granted in special cases. *Id.*

See EQUITY, 2; EXECUTIONS, 3.

INSURANCE—MARINE.

1. INSURANCE—MATERIAL CONCEALMENT.—Not to disclose the time of the arrival of a vessel, when asked, is a material concealment, although the arrival had been mentioned in the newspapers, and was known to one of the directors of the insurance company. *Himely v. S. C. Ins. Co.* 623.
2. MATERIAL FACT.—Every fact and circumstance which can possibly influence the mind of a prudent and intelligent insurer is material. *Id.*
3. DELAY IN THE VOYAGE.—An insured ship must proceed on her voyage with reasonable expedition and by the shortest and safest route. *Id.*

4. **RETURN OF PREMIUM.**—Though an insurance be void for fraud committed by the insured, he is not entitled to a return of the premium. *Id.*

INTEREST.

1. **DOES NOT RUN** on the unpaid purchase-money stipulated to be paid on a contract for the sale of land, where the terms do not provide for the payment of interest, nor will the obtaining possession under the contract create an equitable obligation to pay interest. *Lofland v. Maul,* 106.
2. **THE RATE** is governed by the *lex loci contractus*. *Holley v. Holley,* 342.
3. **COMPOUND**, though not forbidden by the statute against usury, is iniquitous, and equity will not enforce its payment even where there is an agreement to pay it. *Breckenridge v. Brooks,* 401.
4. **UPON RENT IN ARREARS** will not be allowed, because it is in the nature of compound interest, rent being merely compensation for the use of land. *Id.*
5. **ON UNLIQUIDATED CLAIM.**—Interest will not be allowed on an unliquidated claim. *Foster v. Dupre,* 466.
6. **ON PURCHASE-MONEY.**—A vendor who covenants to clear the property from incumbrances, is not entitled to interest on the unpaid purchase-money, until he removes the incumbrances and notifies the purchaser. *Bouthamy v. Ducourneau,* 486.

INTOXICATION.

See **CONTRACTS**, 13.

JEOPARDY.

See **CRIMINAL LAW**, 8, 9; **JURY**, 2.

JOINT TENANCY.

See **STATUTE OF LIMITATIONS**, 5, 6.

JUDGMENTS.

1. **IRREGULAR.**—Money received upon an execution issued under a judgment irregularly entered may be recovered in an action of assumpsit. *Judson v. Eslava,* 32.
2. **NUNC PRO TUNC** may be entered without notice. *Fugua v. Carriel,* 46.
3. **THE DECREE OF AN ORPHANS' COURT**, confirming an administrator's sale cannot be impeached collaterally. *Van Dyke v. Johns,* 76.
4. **THE DEATH OF A JOINT JUDGMENT-DEBTOR** does not discharge the lands of the deceased from the lien of the judgment, and in case the decedent were the principal debtor, his lands alone would be first subjected in equity to the payment of the debt, so as to bar a suit by the judgment-creditor to recover satisfaction out of the lands of the survivor, a surety. *Ex parte Dixon,* 92.

5. **THE EQUITABLE ASSIGNEE OF A JUDGMENT**, for value, and without notice of existing equities in favor of the judgment-debtor, takes it subject to such equities accruing before notice of the assignment. Therefore, such an assignment is subject to the debtor's right to set off a debt due from the judgment-creditor under a decree in equity, made before notice of the assignment, or made afterwards, but entered *nunc pro tunc* as of a date prior to the notice. *Lockwood v. Bates*, 121.
6. **SETTING ASIDE, AT SUBSEQUENT TERM.**—After an entry of final judgment the court cannot, at a subsequent term, set it aside and direct a nonsuit. *Morgan v. Hays*, 147.
7. **A JUDGMENT AGAINST ONE** of two defendants, after service of the writ on both, cannot be sustained on any principle of common law or statute. *Helm v. Van Fleet*, 248.
8. **CONCLUSIVENESS OF JUDGMENT OF SISTER STATE.**—A judgment or decree obtained in another state is conclusive here as to all matters which were or might have been there adjudicated. Hence, a decree of divorce in Kentucky, in which alimony was allowed, concludes the wife from applying in this state for a further provision, although such original allowance was insufficient. *Fischli v. Fischli*, 251.
9. **IN ALLOWING ALIMONY** a court may grant a gross sum or an annuity, based upon the value of the husband's property situated without as well as within the state, and such allowance will be a binding personal demand against him everywhere, or it may give the wife a sufficient part of the husband's property within the state. *Id.*
10. **AMENDMENT OF DECREE.**—A court of equity cannot amend a decree at a subsequent term in a matter of substance, except on a bill of review, and even clerical misprisions can only be corrected where the record furnishes the means of correction. *Bramlett v. Pickett*, 350.
11. **PAYMENT MADE UNDER A DECREE** directing money to be paid to certain persons, as heirs of a decedent, will protect the person paying it, notwithstanding an appeal is subsequently taken, and the judgment reversed. *Phillips v. Johnson*, 505.
12. **AGAINST A DECEDENT.**—A judgment entered against a defendant after his death is void. *Gerault v. Anderson*, 521.
13. **ENTERED IN ANOTHER STATE.**—An action on a judgment entered in another state may be defeated by showing that the court where the judgment was given lost jurisdiction by the death of the defendant *pendente lite*. *Id.*
14. **PREFERENCE BETWEEN.**—If two judgments appear to have been entered on the same day the court will ascertain which was first entered, and award it the preference. *Biggam v. Merritt*, 576.
15. **KEEPING ALIVE A PAID JUDGMENT.**—If a judgment be paid by a friend of one of the parties, it cannot be kept alive without the consent of the defendant. *Head v. Gervais*, 577.

See ATTORNEY AND CLIENT, 2.

JURISDICTION.

1. **FEDERAL OFFICERS** may be sued in the state courts for trespasses committed by them under process issued out of a court of the United States. *Dunn v. Vail*, 512.
2. **SUITS AGAINST THE UNITED STATES** cannot be sustained in the courts of this state. *Orleans Nav. Co. v. Schooner Amelia*, 516.
3. **VESSELS** of the United States can not be seized to compel the payment of toll. *Id.*
4. **DIVIDING ACCOUNT TO GIVE JURISDICTION.**—A running account, though consisting of several items, cannot be divided to give a magistrate jurisdiction. *Grayson v. Williams*, 568.

See STATUTES, 3.

JURY.

1. **INSTRUCTIONS TO A JURY** SHOULD BE POSITIVE and specific, and should leave nothing to inference. *Snyder v. Laframboise*, 187.
2. **DISCHARGE OF JURY.**—A jury, if unable to agree, may, even in a criminal case, be discharged at the end of the term, and also in other cases of inevitable necessity. *State v. Moor*, 541.

See CRIMINAL LAW, 2, 3, 4; VERDICT.

LANDLORD AND TENANT.

NOTICE TO QUIT IS UNNECESSARY if the tenant disclaims to hold under his landlord, and refuses to pay rent, and a warrant for forcible detainer may be instantly brought. *Bates v. Austin*, 395.

LARCENY.

See CRIMINAL LAW, 6.

LAND GRANTS.

See PATENTS.

LEGISLATURE.

THE LEGISLATURE, AFTER MAKING AN ELECTION, have power while assembled to revise or alter what they have done. *State v. Dunn*, 25.

LEX LOCI CONTRACTUS.

See CONTRACTS, 1; INTEREST, 2.

LIENS.

1. **JURISDICTION TO ENFORCE LIENS** is concurrent in law and equity. *Ford v. Spruile*, 439.

2. A **VENDOR HAS NO LIEN ON GOODS** in case of the purchaser's insolvency, where before the insolvency the goods have been delivered to an agent for the purchaser, and the latter has sold them and assigned the contract to a third person for value, and directed the agent to deliver them, and the agent has accordingly charged the goods to the assignee. *Id.*

See **EXECUTIONS**, 13, 14, 15; **VENDOR AND VENDEE**, 3, 4, 5.

LIS PENDENS.

LIS PENDENS IS CONSTRUCTIVE NOTICE to purchasers of all equities arising out of the subject of litigation. Accordingly, under an assignment of a judgment pending a suit resulting in a decree in favor of the judgment-debtor against the creditor for the payment of a balance due from him as a co-partner, the assignee is affected with constructive notice of the debtor's right to set off such decree against the judgment; and if the assignee was a solicitor in the suit in equity, he is held to have actual notice of such right. *Lockwood v. Bates*, 121.

LOTTERIES.

1. A **BOND GIVEN FOR THE PURCHASE OF LOTTERY TICKETS**, where the lottery is unauthorized by law, is merely void; but the consideration of such a bond must be impeached by special plea. *Morton v. Fletcher*, 366.
2. **THE ASSIGNEE OF SUCH A BOND**, if induced to keep it by the representations of the obligor, until recourse on the assignor is lost, can only recover on those representations and not on the bond. *Id.*
3. **MONEY PAID FOR LOTTERY TICKETS**, where the lottery is forbidden by law, may be recovered, for the law is designed for the purchaser's protection; but if the money was paid under a judgment of a court of competent jurisdiction it cannot be recovered. *Gray v. Roberts*, 383.

MALICIOUS PROSECUTION.

IN AN ACTION FOR MALICIOUS PROSECUTION, the plaintiff, who has been discharged from a prosecution for felony, without a trial on the merits, cannot require proof of probable cause, until he shows express malice. *Frouman v. Smith*, 265.

MANDAMUS.

WILL NOT LIE, on behalf of one claiming the office of judge of a county court, directing another who holds the commission and is in the exercise of its duties to admit the petitioner to that office. *State v. Dunn*, 25.

See **PROHIBITION**, 2.

MARRIAGE AND DIVORCE.

See **ALIMONY**.

MESNE PROFITS.

See TREMPASS, 3.

MISTAKE.

PAROL EVIDENCE SHOWING.—In support of an agreement to do that which a prior writing between the same parties omitted to provide for, parol evidence is admissible to show that such omission was the result of a mistake. *Cardwell v. Strother*, 326.

See ASSUMPSIT, 1; DEEDS, 12; PATENTS, 3, 4.

MORE OR LESS.

See DEEDS, 1

MORTGAGES.

1. **REVIVAL OF MORTGAGE.**—If land be conveyed in satisfaction of a mortgage and the title subsequently prove defective, the defect may be the subject of a new demand, but will not operate to revive the original contract without the consent of the mortgagor, nor with his consent to the prejudice of an intermediate mortgagee. *Lasselle v. Barnett*, 217.
2. **THE REGISTRY OF A MORTGAGE** is in judgment of law, notice of such mortgage to subsequent purchasers and mortgagees. *Id.*
3. **THE HEIRS OF THE MORTGAGOR** should be made parties to a *scire facias* against the administrator to foreclose a mortgage of the intestate; if there are no heirs, such fact should appear from the record. *John v. Hunt*, 245.
4. **A MORTGAGEE IN POSSESSION IS LIABLE FOR RENTS** received, but not for interest thereon since he receives no compensation for his services; the interest will be set off against his services. *Breckenridge v. Brooks*, 401.
5. **A MORTGAGEE IS NOT ENTITLED TO COMPENSATION**, for managing the estate himself, beyond interest on the money loaned. *Id.*

See EQUITY, 9; ESTOPPEL.

MUNICIPAL CORPORATIONS.

1. **A NOTE MADE TO A TOWN TREASURER** by name, "or his successors in office," may be sued by the town. *Arlington v. Hinds*, 704.
2. **PAROL EVIDENCE TO SHOW THE TOWN** of which the nominal payee in such note was treasurer is admissible, if the note does not show that fact. *Id.*

See STREETS.

NEGOTIABLE INSTRUMENTS.

1. **A NOTE PAYABLE WITH INTEREST** from date, if not punctually paid when due, carries interest from maturity only. *Fugua v. Carrier*, 46.

2. **CONDITIONAL ACCEPTANCE.**—Where the drawees of a bill of exchange accepted the same, to be paid when they had funds of the drawers in their hands, to charge the latter, proof that the acceptors had received funds of the drawers must be made as well as that demand and notice of non-payment had been given. *Andrews v. Baggs*, 47.
3. **WHERE THE NOTE OF A THIRD PERSON**, received by the creditor in payment of his claim, proves to be forged, he cannot maintain an action on the original consideration, unless, as soon as the forgery is discovered, he offers to return the note, or unless he has exhausted his remedies upon it with due diligence. *Pope v. Nance*, 51.
4. **THE ASSIGNOR OF A NOTE IS NOT LIABLE** thereon, under the Illinois statute, unless the money cannot be obtained after due diligence in an action against the maker. *Mason v. Wash*, 138.
5. **A NOTE IS NOT EVIDENCE OF A SETTLEMENT** of all demands between the parties prior to its date. *Ankeny v. Pierce*, 174.
6. **NOTICE OF PROTEST** of a bill of exchange, for non-payment, must be given to the drawer, unless he has no funds in the hands of the drawee; and it will be presumed that he had funds in the drawee's hands, unless the contrary is shown by the holder. *Baxter v. Graves*, 374.
7. **ASSIGNEE OF NOTE, DEFENSES AGAINST.**—The assignee of a note takes it subject to all available defenses existing at the time of the assignment, but discounts arising out of other transactions, after notice of the assignment, or any defense at law or equity arising after such notice, and not going to affect the consideration, cannot be set up against the assignee. *Bowman v. Halstead*, 380.
8. **THE INSOLVENCY AND DEATH OF THE MAKER** of a note before it falls due, there being no estate or heirs or administration, will render the indorser liable, and the insolvency may be proved by parol. *Clair v. Barr*, 392.
9. **THE MAKER'S INSOLVENCY, IF HE IS ALIVE** when the note falls due, will not excuse the holder from using due diligence in suing him before resorting to the indorser. *Id.*
10. **DAYS OF GRACE** are not allowed on a note payable "on the first day of May next, fixed." *Durnford v. Patterson*, 514.
11. **NEGLECT OF A BANK**, in not demanding payment of a note, so as to charge the indorser, makes it responsible to the payee. *Id.*
12. **LIABILITY OF INDORSER.**—An indorser of a note or bill is not liable until payment has been demanded of the maker or acceptor, and notice of the dishonor given. *Esfert v. Des Coudres*, 609.
13. **INDORSER AFTER MATURITY** is not liable without demand and notice. *Id.*
14. **PROOF OF PROTEST.**—The clerk of a deceased notary produced the notarial record, and was permitted to testify that from the proceedings in the book and the habits of the officer in setting down the initials of the clerks, he (the clerk) must have served the notice of non-payment. *Sharpe v. Bingley*, 643.

15. **RELEASE OF INDORSER.**—Receiving partial payments from the maker, granting him extensions of time, and promising him not to call on the indorser will release the latter. *Id.*
16. **PAROL EVIDENCE AFFECTING INDORSEMENT.**—In an action by the indorsee against the indorser of a non-negotiable note, indorsed in blank after maturity, parol evidence is admissible to show that at the time of the indorsement it was agreed between such indorser and indorsee, that the latter should sue the maker, and have recourse to the indorser only in the event of his inability to collect the amount from the maker. *Miner v. Robinson*, 694.

See AGENCY, 1; ASSIGNMENTS, 4; MUNICIPAL CORPORATIONS; NEGOTIABLE INSTRUMENTS, 13.

NEW TRIAL.

1. **AN AFFIDAVIT OF NEWLY DISCOVERED TESTIMONY** must state the names of the witnesses and the facts to which they will testify. *Forester v. Guard*, 141.
2. **BILL FOR.**—Where the defendant in an action of assumpsit, against whom a verdict and judgment had been obtained, filed a bill in equity for a new trial, on the ground of newly discovered evidence, and averred that due diligence had been used without effect to procure the evidence at the trial, it was held, on demurrer, that the bill would lie. *Deputy v. Tobias*, 243.
3. **IN EQUITY.**—A court of equity will not set aside a judgment at law, and grant a new trial, if the complainant has a just defense on the merits which he, without fault on his part, was, by accident, prevented from making. *Ford v. Ford*, 587.
4. **NEW TRIAL** will not be granted because of the discovery of oral testimony. *Esfert v. Des Coudres*, 609.

See CRIMINAL LAW, 3.

NOTICE.

See EXECUTIONS, 19; LANDLORD AND TENANT; LIS PENDENS; RECORDING; VENDOR AND VENDEE, 1, 2.

OFFICE AND OFFICERS.

- A **MAGISTRATE IS LIABLE IN TRESPASS** for issuing a warrant of arrest officiously, without a complaint on oath or personal knowledge that a crime has been committed. *Flack v. Harrington*, 170.

OUSTER.

See EJECTMENT, 1.

PARTNERSHIP.

1. **FRAUD UPON THE PARTNERSHIP** by one of two partners will be relieved against in a court of equity. So, where a partner gave notes in the

- name of the firm and afterwards confessed judgment thereon, equity will relieve the copartner from such judgment, it appearing that he had no knowledge of the proceedings until the judgment had been obtained. *Morgan v. Scott*, 35.
2. **PAYMENT TO A PARTNER**, is payment to the firm unless expressly forbidden by the other partners. *Gregg v. James*, 151.
 3. **PARTNER'S POWER TO SELL GOODS**.—Where one partner sold all the goods of the firm, and, against the will of his copartner, broke into the store with the purchaser to whom he delivered the goods, it was held that either partner had a right to sell all the goods, and that, unless some of them had been destroyed, trespass would not lie against a partner at the suit of a copartner. *Montjoy v. Holden*, 331.
 4. **PARTNER EXECUTING SEALED INSTRUMENT**.—A partner has no power to bind his copartner by an instrument under seal, without special authority. *Trimble v. Coons*, 411.
 5. **MEMBERS OF UNINCORPORATED COMPANIES** are liable as partners. *Lynch v. Postlethwaite*, 495.
 6. **ACTION BETWEEN PARTNERS**.—Unless there is a settlement and an express promise to pay, one partner cannot maintain an action at law against the other. *Course v. Prince*, 649.
 7. **PARTNERSHIP LIABILITY**.—Where the party seeking to charge the partnership is apprised that the transaction is not for or on account of the firm, that the credit is not for their benefit, and the act is not in the usual course of business, *prima facie*, the firm is not holden. *Huntington v. Lyman*, 716.
 8. **GIVING CREDIT TO PARTNERSHIP**.—It is not necessary to secure a person giving credit to a partnership that he should know or believe that each individual of the firm would approve the transaction, but it is necessary that he should not know that the debt attempted to be secured, was not the debt of the partnership, or the property sold was not to inure to their benefit, in the absence of all proof of the assent or approbation of the party to be charged. *Id.*

PATENTS—LAND.

1. **TO RESTORE LOST LINES AND CORNERS**, no departure should be made from the course or distances except in cases of necessity, and where it is necessary to depart either from the course or the distances, the distances ought to yield. *Bryan v. Beckley*, 276.
2. **ALLOWANCES FOR THE VARIATION** of the magnetic needle from the true meridian are to be made in all cases where lost lines and corners are to be renewed. Allowances are also to be made for the unevenness of the ground over which each line passes. *Id.*
3. **A MISTAKE IN A DISTANCE** committed in the original survey on one line is presumed to have affected the opposite line only. *Id.*
4. **A MISTAKE IN ONE COURSE**, evidenced by applying the patent to the ground, cannot be applied or be made by presumption to affect any other course named. *Id.*

5. **VISIBLE AND ACTUAL LANDMARKS** are to be preferred in restoring lost lines and corners; if they cannot be ascertained, resort must be then had to the courses and distances. *Id.*
6. **THE RIGHT ACQUIRED BY ENTRY** is not a legal but an equitable right, and depends upon an executory contract with the government. *Reed v. Bullock*, 345.
7. **THE ENTRY IS THE INCEPTION OF THE TITLE** and not the survey made upon it; therefore the expiration of the statutory time after entry will bar the right to recover. *Id.*
8. **WRONGFUL ISSUE OF PATENT.**—One who receives a patent from the government when another is entitled thereto, may be declared to hold as trustee for such other. *Stark v. Mather*, 553.
9. **CONFIRMATION OF A SPANISH TITLE** relates back to the original grant. *Id.*
10. **UNLAWFUL REVOCATION OF GRANT.**—Where a grant was arbitrarily revoked, and the property re-granted to another, to whom the title was confirmed, he was decreed to hold as trustee for the first grantee. *Id.*

PAYMENTS.

See JUDGMENTS, 11; PARTNERSHIP, 2.

PERSONAL PROPERTY.

1. **ONE WRONGFULLY DISPOSSESSED OF HIS GOODS** may retake them whenever he can find them, provided it be not done in a riotous or forcible manner. *Bobb v. Bonworth*, 273.
2. **A FORCIBLE ATTEMPT TO RETAKE GOODS** may be repelled by force, and if the one making such forcible attempt wound the other, an action for the battery will lie in favor of the latter, although the first may have had the better claim to the property. *Id.*

See CONFLICT OF LAWS, 1; TENDER, 1, 6, 7, 8.

PLEADING AND PRACTICE.

1. **A FINAL HEARING ON THE DEMURRER** of one of two defendants may be had, although the other defendant had not appeared, provided sufficient has been disclosed to enable the court to determine the rights of all the parties concerned. *Morgan v. Scott*, 35.
2. **AN AVERMENT OF SCIENTER** is unnecessary in an action of assumpsit for breach of warranty of soundness. *Wren v. Wardlaw*, 60.
3. **AN OMISSION OF THE AMOUNT OF DAMAGES**, in a declaration, is merely technical, and can be taken advantage of only in the court below. *Hargrave v. Penrod*, 201.
4. **ASSIGNING BREACHES OF BOND.**—If the declaration on a bond sets out the condition and assigns the breaches, they need not be reassigned in the replication. *Conover v. Commonwealth*, 451.
5. **A WRIT OF ERROR CANNOT EMBRACE TWO DISTINCT DECREES** rendered at different terms although in the same suit. *Carnel v. May*, 453.

6. **DISCONTINUANCE OF SUIT.**—An action not on trial before a jury cannot be discontinued without permission of the court. *Hunt v. Morris*, 499.
7. **OBJECTIONS WAIVED BY DELAY.**—After the parties in chancery have, under pleadings framed for that purpose, gone into an accounting, it is too late to object that the jurisdiction of the court ought to have been confined to other matters. *Head v. Gervais*, 577.
8. **TERMS OF GRANTING A CONTINUANCE.**—A court may, as terms for granting a continuance, require the applicant to consent to the reading of an informal deposition. *Hamilton v. Cooper*, 588.
9. **SUING JOINT CONTRACTOR.**—If one joint contractor die, the survivors only can be sued at law; and when all have died, the action must be against the representative of the last survivor. *Ayer v. Wilson*, 677.
10. **PARTIES TO ACTION.**—The same person cannot be both plaintiff and defendant, although he is the representative of conflicting rights. *Livingston v. Livingston*, 684.

See EJECTMENT, 1.

POSSESSION.

See ADVERSE POSSESSION; REAL ESTATE.

POWERS.

See FRAUD, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PROHIBITION.

1. **WRIT OF.**—A prohibition is commonly defined to be a writ issuing out of a superior court, directed to the judge and parties of an inferior court, commanding them to cease from the prosecution of a suit, because of want of jurisdiction over the suit or some collateral matter therein; but the writ may be directed to persons whose functions have little or nothing of a judicial nature. *State v Commissioners of Roads*, 596.
2. **WRITS OF PROHIBITION, MANDAMUS, QUO WARRANTO, INDIGAVIT, AND WASTE,** contrasted and explained. *Id.*
3. **ISSUES IN PROHIBITION** should be submitted to a jury. *Id.*

QUO WARRANTO.

See PROHIBITION, 2.

REAL ESTATE.

PRIOR POSSESSION IS SUFFICIENT EVIDENCE of a fee unless rebutted, although it is the lowest evidence; and where there is no other evidence of

title, prior possession short of twenty years will prevail over a subsequent possession for the same time, and will suffice without other proof to put the tenant on his defense.

See ADVERSE POSSESSION

RECORDING.

See DEEDS, 8; MORTGAGES, 2.

REHEARING,

See EQUITY, 3.

RELEASE.

See DEEDS, 10.

RENT.

See INTEREST, 4; MORTGAGES, 4.

SALE.

1. A DELIVERY AND ACCEPTANCE OF GOODS, before the day of payment, passes the legal title to the vendee. *Ford v. Sproule*, 439.
2. LOSS BY FIRE, VENDEE MUST BEAR.—When a contract of sale has been consummated, and the price paid and the property, though ready for delivery, is not removed by the vendee because not convenient for him to do so, he must bear the loss of its destruction by fire. *Smith v. Newitt*, 571.

See CONFLICT OF LAWS, 6, 7; DAMAGES, 1; EVIDENCE, 5.

SCIENTER.

See PLEADING AND PRACTICE, 2.

SERVICES.

See EMPLOYER AND EMPLOYEE.

SET-OFF.

1. A DEBT DUE ONE of two joint obligors may be set off under their joint plea in an action of debt brought by the administrators of the obligee on the joint bond. *Pitcher v. Patrick*, 54.
2. A DEBTOR IS ENTITLED TO SET-OFF in equity payments made by him to discharge indebtedness of the plaintiff to third person, and this although the debtor showed no authority to make the payments. *Lofland v. Maull*, 106.
3. THE ONUS OF PROVING the existence of debts sought to be set off by the defendant is not thrown upon him where the plaintiff excepts to the defendant's sworn account filed in answer to the bill. *Id.*

4. **IN EQUITY.**—Mutual credits are a ground of set-off in equity, though not at law. Hence a decree in favor of the plaintiff seeking a partnership account may be set off against a judgment at law in favor of the defendant in the decree and against the plaintiff. And this right of set-off is not affected by the fact that, by the decree, balances were made payable to other partners also, provided the partners are entitled severally under the decree. *Lockwood v. Bates*, 121.
5. **DEBTS SET OFF MUST BE MUTUAL** between the parties to the record. Therefore, in an action to recover a debt due a partnership, a debt due from one copartner cannot be set off. *Gregg v. James*, 151.
6. **THE CONSIDERATION OF A DEBT** by simple contract sought to be set off, must be alleged in equity as well as at law. If it is not so alleged, the decree on a bill taken *pro confesso* will be reversed. *McKean v. Reed*, 318.

SHERIFFS.

1. **DEED AFTER EXPIRATION OF TERM.**—A sheriff who has sold land under an execution, may lawfully execute a deed of conveyance thereof after the expiration of his term, although another sheriff may have qualified and entered upon the duties of the office. *Lemon v. Craddock*, 301.
2. **A SHERIFF NEGLIGENCELY LOSING PROPERTY** upon which he has levied, is liable to the owner therefor; and no demand of restoration is necessary if the owner pays the plaintiff his debt. The loss of the property is enough, whether it occurs before or after payment. *Conover v. Commonwealth*, 451.

See EXECUTIONS, 1, 5, 6.

SHIPPING.

1. **LIABILITY OF JOINT OWNERS.**—A part owner of a ship is answerable to his co-owner for ordinary negligence, and for not taking such care of his co-owner's property as he takes of his own. *Ralston v. Barclay*, 483.
2. **IN AN ACTION AGAINST A MASTER OF A VESSEL** for goods damaged in a voyage, it is not necessary for plaintiff to show that he has sold any part of the goods. *Shackelford v. Patrick*, 632.

SLANDER.

1. **WORDS CHARGING THE CRIME AGAINST NATURE** are not actionable *per se* in Alabama. *Coburn v. Harwood*, 37.
2. **THE OFFICE OF THE INNUENDO** IS MERELY EXPLANATORY; it cannot enlarge or change the import of the words used, or give a criminal meaning to innocent words. *Id.*
3. **IN SLANDER, ALL THE WORDS LAID** need not be proved, but so much of them must be proved as is sufficient to sustain the cause of action; evidence of equivalent words will not suffice. *Wheeler v. Robb*, 245.
4. **THE SUBSTANCE OF THE WORDS**, or the words themselves as laid, must be proved to sustain the plaintiff's action upon the general issue. *Id.*
5. **ALL WHO REPEAT A SLANDER** ARE RESPONSIBLE therefor, and general reports previously in circulation to the same effect are no justification, al-

though they are admissible in mitigation of damages as extenuating malice. *Calloway v. Middleton*, 409.

6. WORDS UTTERED IN A REGULAR COURSE OF JUSTICE, however defamatory, are not actionable. *Hardin v. Cumstock*, 427.
7. IF AN ATTORNEY INSERTS SLANDEROUS MATTER in the pleadings, without his client's direction, the latter is not responsible. *Id*

SPECIFIC PERFORMANCE.

1. COVENANTS OF PERSONAL SERVICE cannot, as a general rule, be specifically enforced, either at common law or by statute. The case of apprentices depends on parental authority; that of soldiers and sailors on national policy. *Clark's case*, 213.
2. *IDEM*.—Where a free negro woman over the age of twenty-one years bound herself by indenture in this state, for a valuable consideration, to serve the obligee as a menial for twenty years, it was held that a specific performance of the contract could not be enforced, and that upon a writ of habeas corpus she was entitled to be discharged from custody. *Id*.
3. THAT SERVICE IS INVOLUNTARY, within the meaning of the constitution, is shown by the application to be discharged on habeas corpus. *Id*.
4. AN INDENTURE EXECUTED BY A NEGRO or mulatto out of the state of Indiana, is considered void in that state, and can neither be specifically enforced nor made the foundation of an action for damages. *Id*.
5. OF PART.—Equity will not compel one to accept a deed for part of a tract of land agreed to be conveyed, and to receive compensation for the residue. *McKean v. Reed*, 318.
6. WHEN DENIED.—If the party seeking the specific execution of a contract, has been in default without excuse, chancery will not make compensation to the opposite party, and then decree a specific execution. *Moore v. Skidmore*, 333.
7. A CONTRACT TO BE SPECIFICALLY ENFORCED must be certain in every part. *Rankin v. Maxwell*, 431.
8. IF PART OF THE LAND IS LOST, a vendee, seeking specific performance of a contract to convey, will not be compelled to take such part, but may take the safe land and compensation for the residue, or may refuse to take any part and go for compensation for the whole land. *Id*.
9. THE MEASURE OF COMPENSATION, if the loss is not imputable to the vendor, is the value of the land at the date of sale, with interest from the time the purchase-money fell due. *Id*.
10. BENEVOLENT INTENTIONS.—Promises founded solely on benevolent intentions will not be specifically enforced. *Mercer v. Stark*, 583.

See ACCORD AND SATISFACTION.

STATUTES.

1. WHERE A NEW RIGHT is introduced by statute, the statutory remedy is the one to be pursued, but where there is a pre-existing right at common law and an affirmative statute inflicts a new penalty, the law is otherwise. *Lang v. Scott*, 257.

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2. CONSTRUCTION OF A STATUTE is admissible only where there is ambiguity. *Gains v. Gains*, 375.
3. THE REPEAL OF A STATUTE giving jurisdiction to a court deprives it of the right to pronounce judgment in a proceeding previously pending. *Todd v. Landry*, 479.

See CONSTITUTIONAL LAW, 1, 4.

STATUTE OF FRAUDS.

1. PAYMENT OF THE PURCHASE-MONEY, or a part thereof, will be considered a performance to take a parol contract for the sale of land out of the statute of frauds; and whenever the non-performance by the vendor would be a fraud upon the vendee, such contract will be specifically enforced. But such payment must be clearly made in execution of the contract. *Houston v. Townsend*, 109.
2. PART PERFORMANCE MAY BE PROVED, generally by parol; but the payment of money being an equivocal act, the fact that it was paid in execution of the contract must either be admitted or proved by writing. *Id.*
3. THE TERMS OF THE CONTRACT may be proved by parol, the fact of a part performance having been first established. *Id.*
4. SALES BY AUCTION are within the statute of frauds, but the auctioneer is the agent of both parties, and the note or memorandum made by him binds both. *Davis v. Robertson*, 611.

STATUTE OF LIMITATIONS.

1. ANY EVIDENCE OF A NEW PROMISE to take a case out of the statute of limitations should be left to the jury, with proper instructions as to the law. *Mellick v. De Seelhorst*, 172.
2. AN UNQUALIFIED PROMISE TO PAY A BARRED DEBT will take it out of the statute, and if there be a qualification, the plaintiff must do away with it by proof. *Id.*
3. AN ACKNOWLEDGMENT OF THE DEBT as still subsisting, or a part payment of it, is sufficient evidence from which to infer a new promise. *Id.*
4. THE STATUTE OF LIMITATIONS COMMENCES to run as to a person immediately upon his arrival in the state. *Robertson v. Smith*, 304.
5. DISABILITIES OF JOINT TENANTS.—Where one of several joint tenants is under no disability, the statute of limitations will run against them all. *Id.*
6. PARCENERS AS JOINT TENANTS.—The estate in lands which heirs hold by descent from their ancestor is joint; and the nature of the estate on coming to the heirs must control the operation of the statute of limitations. *Id.*
7. TWENTY YEARS ADVERSE PEACEABLE POSSESSION is a bar to a suit in chancery to recover land, as much as it would be in an action of ejectment. *Reed v. Bullock*, 345.
8. IN EQUITY.—The statute of limitations does not in terms apply to suits in equity, but where legal relief is barred by lapse of time equity will not

interfere; hence equity will not aid a stale transaction thirty-four years old. *Frame v. Kenny*, 367.

9. THE STATUTE OF LIMITATIONS OF ANOTHER STATE does not bar a recovery in the courts of this state, except where it has operated to confer a title to property while situate in such state. *Hamilton v. Cooper*, 588.
10. NEW PROMISE, made by one of several executors, takes the case out of the statute. *Briggs v. Starke*, 659.
11. SUSPENSION BY DISABILITY.—When the statute once begins to run, neither insanity nor any other supervening disability arrests its progress. *Adamson v. Smith*, 665.
12. STATUTE OF LIMITATIONS, COMMENCEMENT OF.—Where there is a promise to pay, either at an indefinite time, or on the happening of a contingency which is within the control of the promisor, the statute commences at once. *McDowell v. Goodwyn*, 685.
13. AFFECTING ATTESTED NOTE.—Where the statute of limitations prescribes a longer period for a note attested by one or more witnesses than for notes not so attested, and a note made to a town is attested by a resident of the town, such note will be regarded as an attested note, unless it clearly appears that the witness was a rated inhabitant, or was otherwise disqualified by reason of interest. *Arlington v. Hinde*, 704.

See ADVERSE POSSESSION, 2.

STREETS.

FOR AN INJURY TO THE STREETS, the president and trustees of an incorporated town have not such a possession as will enable them to maintain an action of trespass, *quare clausum fregit*. *Conner v. New Albany*, 207.

SUNDAY.

ORDER MADE ON.—If an order made by a judge in vacation bears date on Sunday, it is for that reason void. *Coleman v. Henderson*, 290.

SURETYSHIP.

See BAIL; EVIDENCE, 25.

TENDER.

1. OF MONEY OR PROPERTY must be made at a convenient time before sunset. *Williams v. Johnson*, 275.
2. WAIVER OF.—The positive declaration of one to whom money is to be paid within a certain time, that he will not receive it, will excuse the tender of the money, provided the declaration is made before the expiration of the time. *Dorsey v. Barbee*, 296.
3. TENDER OF CONVEYANCE is unnecessary where the other party has declared his unwillingness to accept it. *Lynch v. Postlethwaite*, 495.
4. AN OFFER OF MONEY IN BAGS is a legal tender. It is sufficient that the party offered to pay the requisite amount. *Behaly v. Hatch*, 570.
5. TENDER OF PERFORMANCE, if no place is fixed, may be made to the person. *Bates v. Bates*, 572.

6. **TENDER OF PROPERTY** is not good, unless the articles are specifically pointed out, so that their identity can be ascertained. *Id.*
7. A **TENDER OF SPECIFIC ARTICLES** at the time and place appointed by the contract, discharges the contract, and vests the property in the creditor, whether he attends to receive it or not. *Barney v. Bliss*, 696.
8. A **PLEA OF TENDER** of specific articles must state an actual tender; and a plea stating that the debtor had the property ready at the time and place to deliver to the creditor, and there remained throughout the day, but that the creditor did not attend to receive it, and that it is still ready for the creditor if he will receive it, is insufficient. *Id.*

See **ACTIONS; DEEDS**, 11.

TORTS

See **ASSUMPSIT**, 2; **ATTACHMENT**, 2.

TRESPASS.

1. To **RECOVER POSSESSION** may be maintained on a contract between the owner of the fee and the plaintiff, by which the plaintiff was to take possession, make certain improvement within a given time, and then receive title in fee. Nor can a stranger resist a recovery on the ground that the plaintiff has not performed the conditions of the contract. *White v. Saint Guirons*, 56.
2. A **RIGHT OF ENTRY AND POSSESSION** are alone sufficient to sustain trespass. It is not necessary to prove actual possession or ouster, and the plaintiff may recover, though the defendant be in possession of less than is declared for. *Id.*
3. **DAMAGES FOR MESNE PROFITS** may be recovered in trespass, as well as the possession. *Id.*
4. If **ONE AGREE TO A TRESPASS** which has been committed by another for his benefit, trespass will lie against him although the act was not done in obedience to his command or at his request. *Caldwell v. Sacra*, 285.

See **ATTACHMENT**, 2; **INJUNCTIONS**, 4; **OFFICE AND OFFICERS**.

TRUSTS AND TRUSTEES.

1. **THE PERSON FOR WHOSE BENEFIT** a trust is created may compel the performance thereof, in equity, although he may be no party to the contract. Accordingly, where the first of several judgment-creditors entered into a written agreement with those subsequent to the second, that if they would allow the first to purchase at sheriff's sale a certain portion of the judgment-debtor's realty, without let or hindrance, he would discharge the remainder of the realty from his judgment and would pay the second judgment-creditor, it was held that the latter although no party to the agreement could enforce the contract in equity. *Rodney v. Shankland*, 70.
2. **AN EXPRESS TRUST DOES NOT ARISE** in favor of the heirs at law, and against the administrator who purchases through a third person lands sold under an order of the probate court, where there is no proof of any

declaration of trust between the parties, nor of any declaration in writing under the statute of frauds. *Van Dyke v. Johns*, 76.

3. **NOR DOES A TRUST BY LEGAL IMPLICATION** exist in such case, there being no consideration to raise the use upon the legal estate created by the deed of bargain and sale. *Id.*
4. **A TRUSTEE'S SALE TO HIMSELF** is, as a general rule, void; but it is not universally true that such a sale is void at all times and under all circumstances. *Id.*
5. **IF A CESTUI QUE TRUST ACQUIESCE** for a long time in an improper purchase by a trustee, equity will not assist him to set aside the sale. So, where the complainants did not file their bill until thirty years after the sale complained of, and more than twelve years after the arrival at majority of the youngest heir, equity will not relieve. *Id.*
6. **AN ADVERSE CLAIM PURCHASED BY A TRUSTEE** inures to the benefit of the *cestui que trust*. Hence, where one holding a tract of land, one half to himself, and one half as trustee for another, buys in an adverse claim, the latter is entitled to the benefit of half of such claim, and is liable for half the purchase-money and interest. *McClanahan v. Henderson*, 412.
7. **RIGHT OF TRUSTEE TO RELINQUISH CLAIM.**—Where one holds land, one half for himself and one half in trust for another, if he relinquishes to an adverse claimant any part of the land, he must either show the superiority of the adverse title, or submit to have the land relinquished taken out of his own moiety. *Id.*
8. **RIGHTS OF TRUSTEE AS TO IMPROVEMENTS.**—Where one holds land, one moiety for himself and one moiety as trustee for another, he is entitled to be reimbursed one half the amount expended in improvements, and is liable for one half the rents. *Id.*
9. **PURCHASE WITH FUNDS OF ANOTHER.**—If an agent purchases property in his own name with the funds of his principal, he holds in trust for the latter, and may be compelled to convey. *Hill v. Sprigg*, 507.
10. **PROMISE FOR BENEFIT OF THIRD PERSON.**—Where a promise is made to one person to pay money for the benefit of a third, the latter can neither enforce it nor discharge it, unless it appears to have been the intention that he should receive the money when paid. *Tuttle v. Catlin*, 691.

See EVIDENCE, 22; EXECUTORS AND ADMINISTRATORS, 2; PATENTS, 8.

VENDOR AND VENDEE.

1. **A PURCHASER HAVING NOTICE** of a prior equitable title before the payment of the purchase-money or the execution of the deed cannot hold the land against such title. *Gallion v. McCaslin*, 208.
2. **NOTICE GIVEN BY THE TENANT** in possession under the claimant of an equitable title, is as available against the purchaser as if given by the claimant himself. *Id.*
3. **VENDOR'S LIEN.**—Where an agreement is made for the sale of real estate, the purchaser to have immediate possession, but the title to remain in the vendor till the money is paid, an express lien on the land is thereby created in favor of the vendor. *Lagow v. Badollet*, 258.

4. **IDEM—WAIVER OF.**—Such lien is not waived by a stipulation in the agreement that the purchaser is not to remove a certain steam-engine on the land until the money is paid, though this constitutes an express lien on the engine. *Id.*
5. **IDEM—ASSIGNABILITY OF.**—The lien created in favor of the vendor by such an agreement is not merely personal to him, but may be assigned, and the assignment will be supported in equity to promote the ends of justice. *Id.*
6. **VENDOR AS TRUSTEE.**—The vendor in such a case being a mere trustee of the legal title for the purpose of conveying to the purchaser, on payment of the purchase-money, a purchaser at an execution sale of the vendor's interest in the land, having knowledge of the agreement, takes subject to the trust, and will be compelled to execute it. *Id.*
7. **RIGHTS OF VENDEE ON RESCISSION.**—Where, after the vendee has entered under a contract for the sale of land, the contract is rescinded on account of the misrepresentations of the vendor, and his inability to make a good title, the vendee will not be obliged to pay rent beyond the profits actually received. *Richardson v. McKinson*, 308.
8. **IDEM—IMPROVEMENTS BY VENDEE.**—Upon the rescission of a contract of sale of land, the vendee in possession is entitled to recover the value of lasting improvements made by him. *Id.*
9. **ON RESCINDING A CONTRACT** the law requires that the parties should be placed in *statu quo*, and it rests with the party objecting to the application of this rule to make out a clear case. *Carneal v. May*, 453.
10. **LOSS OF PART OF LAND—COMPENSATION.**—A purchaser of land, who discovers, upon receiving the conveyance, that a part of it has been previously sold, may either keep the part conveyed and claim compensation for the residue, or reject the conveyance and seek compensation for the whole. *Id.*
11. **RESCINDING CONTRACT OF PURCHASE.**—A vendee in possession of land before conveyance has no right to rescind his contract of purchase, there being no eviction by title paramount. *Gale v. Green*, 548.

See LIENS, 2.

VERDICT.

STATEMENTS OF JURORS ARE NOT ADMISSIBLE to impeach their verdict. *Wester v. Guard*, 141.

WARRANTY.

See DAMAGES, 2; EXECUTIONS, 18.

WASTE.

1. **IS WHATEVER TENDS TO THE DESTRUCTION** of the inheritance or to its depreciation in value, and may be committed of land as well as in houses and timber. *Wilds v. Layton*, 91.
2. **WHO MAY HAVE ACTION FOR.**—At the time the waste is committed, the party must have title to the land, to sustain his action for the injury. *Hughlett v. Harris*, 104.

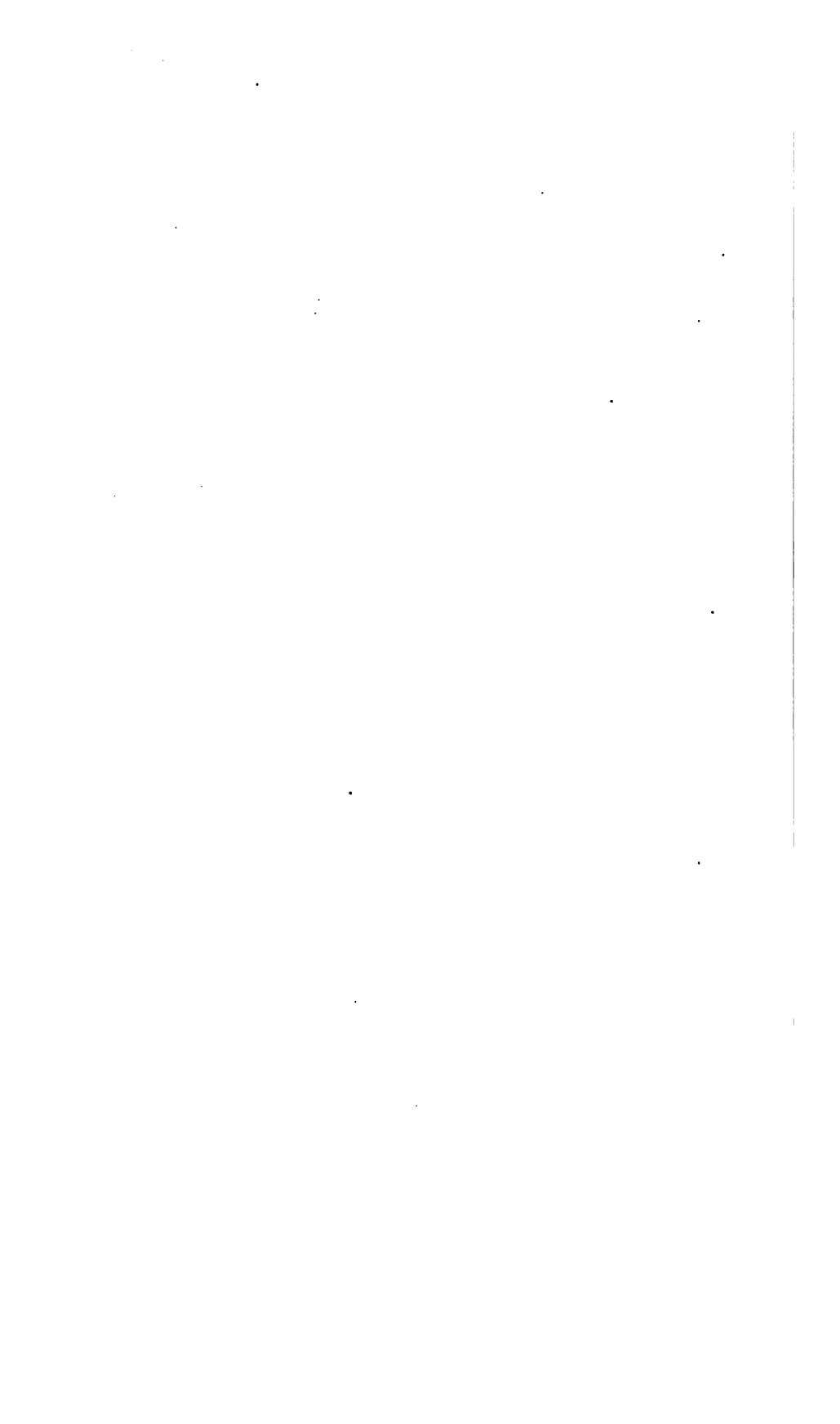
See EQUITY, 2; INJUNCTIONS, 1, 2; PROHIBITION, 2.

WILLS.

1. A PATENT AMBIGUITY IN A WILL, or one leaving the testator's intention doubtful, cannot be explained by evidence *dehors* the will, but it is otherwise as to a latent ambiguity, or one in which the intention is clearly expressed, but where there is a doubt as to the object to which such intention applies. *Breckenridge v. Duncan*, 359.
2. CONSTRUCTION OF DEVISE.—A devise, to a daughter, of slaves "put in her possession" by the testator, does not include a slave hired to the husband of such daughter. *Id.*
3. REVOCATION PREVENTED BY DEVISEE.—An intention to revoke a will unaccompanied by any of the acts of revocation mentioned in the statute, will not amount to a revocation, even if such acts be prevented by the fraud or force of the devisee, although such devisee may be considered in equity as the trustee of the parties, who would have been entitled if the will had been revoked. *Gains v. Gains*, 375.
4. JURISDICTION FOR PROBATE OF A WILL having once attached, is not divested by a subsequent division of the county. *Lindsay v. McCormack*, 387.
5. ONE WITNESS IS SUFFICIENT TO PROVE A WILL, if he can testify to every fact necessary to its legal execution, although the statute may require two witnesses to attest it. *Id.*
6. A FEE PASSES WITHOUT WORDS OF INHERITANCE in a devise if the testator, not having perfected his title, evinces an intention that the devisee shall take the same in his own name from the government. *Id.*
7. A DEVISE IMPOSING A PERSONAL CHARGE on the devisee passes a fee without words of inheritance. *Id.*
8. PROOF OF A WILL.—If the witnesses to a will cannot be found, or though found, deny their signatures, circumstantial evidence may supply the deficiency. The handwriting of the witnesses may be proved, and the jury left to determine from all the circumstances whether the will was published with the requisite formalities. *Pearson v. Wightman*, 636.
9. WILL ON SEVERAL SHEETS OF PAPER.—It has never been determined that each of the several sheets of paper on which the will is written must be signed by the testator. *Id.*
10. EVIDENCE OF SUBSCRIBING WITNESS need not show that he recollects the time and occasion when he acted as a witness. It is sufficient that he identifies his signature, and feels assured in his own mind that he would not have affixed it without first hearing the will acknowledged. *Id.*
11. TESTIFYING FROM MEMORANDA.—A witness may testify from written memoranda, though they do not recall the facts to his memory; and such evidence is better than unaided recollection. *Id.*
12. PAROL PROOF OF A WILL is admissible when the original is lost. *Reeves v. Booth*, 679.

WITNESSES.

See EVIDENCE, 12, 16, 20, 21.





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